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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

STEPHEN A. GONSALVES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the district court correctly invoked "supervisory power" to dismiss the indictment on the ground that conducting a trial would impose an undue burden upon the court.

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STEPHEN A. GONSALVES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-23a) is reported at 691 F.2d 1310. The district court's order granting respondent's motion to dismiss the indictment (App. B, *infra*, 24a-26a) is unreported. The 1976 oral opinion of the district court granting motions for "acquittal" filed by three other defendants charged along with respondent in the indictment (App. C, *infra*, 27a-41a), upon which the court relied in dismissing the indictment as to respondent, is likewise unreported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 42a) was entered on November 9, 1982, and a timely petition for rehearing was denied on February 28, 1982 (App. E, *infra*, 43a). On April 23, 1983, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari until

May 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 3231 provides in pertinent part:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

STATEMENT

On March 25, 1976, respondent and 12 other defendants were charged in a two-count indictment returned by the federal grand jury in the District of Nevada with conspiracy to import hashish, a controlled substance, into the United States, in violation of 21 U.S.C. 952(a), 960(a)(1) and 963, and conspiracy to possess that contraband with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. Respondent was a fugitive for several years after the return of that indictment. See *United States* v. *Gonsalves*, 675 F.2d 1050, 1051-1052 (9th Cir. 1982). He surrendered to federal authorities in Las Vegas on August 28, 1980, and his case was set for trial. On September 28, 1980, respondent moved to dismiss the indictment on the grounds that previously had been stated by the district court in 1976 in entering judgments of acquittal as to three of the other defendants charged in the indictment. On December 17, 1980, the district court (Foley, J.), invoking "discretionary supervisory powers," dismissed the indictment as to respondent. The court stated that the indictment was "a complex monstrosity," and that dismissal was warranted for the "reasons articulated in this Court's [prior] order and judgment of acquittal" as to the three defendants previously prosecuted (App. B, *infra*, 26a). The court of appeals affirmed.

1.a. In December 1975 a grand jury sitting in Nevada returned a three-count indictment, Cr. LV 75-198, charging respondent and 15 other individuals with conspiracy to import hashish and conspiracy to possess hashish with intent to distribute, (Count I), importation of hashish (Count II), and possession thereof with intent to distribute (Count

III).[1] Only three of the defendants, Richard Kenneth Brown, Robert David Work, and Kent Giles Snyder, were apprehended at the time. The others were citizens of other countries and nonextraditable, or (like respondent) fugitives. After the government voluntarily dismissed the two non-conspiracy counts pursuant to Fed. R. Crim. P. 48(a), a motion was filed to dismiss the remaining count on the ground that it charged two separate (albeit related) offenses without separating them into counts, in violation of Fed. R. Crim. P. 8(a). On February 26, 1976, the district court granted that motion without prejudice to reindictment. The district court also took the occasion to complain about other aspects of the case presented to him:

> Count I of the indictment now dismissed names 16 defendants. Ten of the defendants are citizens of other countries and not amenable to the process of this Court, and according to the Government, there is no way they can be compelled to appear before this Court pursuant to treaty between the United States and the countries of which they are citizens. Of the 6 defendants that are citizens of the United States, only 3 are before the Court, the other 3 are fugitives and the Government cannot assure the Court as to whether or not pending bench warrants will ever be served upon them. The indictment names some 14 co-conspirators who are not defendants and alleges 93 separate overt acts alleged to have taken place in the United States and many foreign countries.

The district court concluded:

> The Court hopes that in representing the matter to the Grand Jury United States Attorney Lawrence Semenza will make some effort at least to comply with the requirements of Rule 7(c)(1)[2] and, in addition, to give the Court a case that is manageable for trial. Count I of the indictment now dismissed is, to say the least, a monstrosity.

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[1] Respondent was not charged in Counts II and III.

[2] Fed. R. Crim. P. 7(c)(1) provides, in pertinent part:

> The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

b. Less than a month later, on March 25, 1976, the grand jury returned another indictment, Cr. LV 76-39, based upon the scheme previously charged.[3] The two-count indictment charged 13 defendants, including respondent, Brown, Work, and Snyder, with conspiracy to import a controlled substance (hashish), in violation of 21 U.S.C. 952(a), 960(a)(1) and 963 (Count I) and conspiracy to possess a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846 (Count II). The twin conspiracies charged each spanned the period March 4, 1973 to June 1, 1974. Ten overt acts were enumerated, and 17 unindicted co-conspirators were named.

The indictment charged that defendants repeatedly imported large quantities of hashish. As ultimately elaborated in the government's trial memorandum submitted in connection with the scheduled trial of defendants Brown, Work, and Snyder, five successive episodes of importation were involved. Each episode entailed shipment of specially constructed oversized stereo speaker cabinets to a location in Europe, transfer of large amounts of cash from central figures in the United States to operatives in various European cities who purchased the hashish, insertion of the contraband into plastic inserts which were in turn installed in the stereo speaker cabinets, shipment of the speaker cabinets to various United States cities by air freight, and claiming of the cabinets and removal of their illicit contents. The last of these shipments was destined for Las Vegas but was intercepted by federal agents, triggering the investigation that produced the 1975 and 1976 indictments.

The case was ready for trial in the fall of 1976. Defendants Brown, Work, and Snyder were still the only ones who could be located for trial. The court allowed the motions that had previously been filed attacking the earlier indictment to be refiled in this case but did not act upon them before impaneling a jury and entertaining opening statements on September 21, 1976.[4] The next morning, however, rath-

[3] Indictment Cr. LV 76-39 is reproduced as Appendix F, 44a-51a, *infra*.

[4] It appears that the district court intended by its failure to act to deny those motions (see App. C, *infra*, 34a).

er than proceeding with the government's case as scheduled, the district court invited the defendants to move for judgments of acquittal based on the government's opening statement and trial memorandum (App. C, *infra*, 30a).

Observing that "I read the trial memorandum last night, I hadn't read it before" (App. C, *infra*, 29a), the district judge went on to explain at considerable length that he was unwilling to proceed with trial (*id.* at 30a-41a). His remarks made three interrelated points: (1) that the government should have charged each of the major episodes described in the government's trial memorandum as a separate conspiracy (*id.* at 31a-34a, 38a, 41a); (2) that if the charges had been so divided venue would not lie in Nevada as to several of the sub-offenses that could have been charged (*id.* at 31a, 38a, 41a); and (3) that the case was, in any event, too complex and unmanageable to try, and the indictment would accordingly be dismissed under the inherent supervisory power the court believed it possessed (*id.* at 34a-35a, 38a-40a). The latter theme was dominant in the court's remarks. Also interspersed throughout the court's remarks were comments reflecting strained relations between the individual district judge presiding and United States Attorney Lawrence Semenza.

Because of the extraordinary nature of the district court's explanation of its ruling, we review these comments in some detail.

The district court commenced (App. C, *infra*, 30a):

> [I]n the Alice in Wonderland mind of Lawrence Semenza, who is United States Attorney for Nevada, we have conjured up here a massive conspiracy. This isn't the first time Mr. Semenza, in his own inimitable way, has conjured up a massive conspiracy. Back in 1974, I spent a whole summer, missed the Judicial Conference, trying one of Larry Semenza's dreams * * *.

The district court recounted this prior experience in trying an elaborate multi-defendant drug case. The court singled out repetitive cross-examination and the rudeness of the defendants' counsel as the signal difficulties of the earlier

trial *(ibid)*. The court stated *(ibid.)*, "Mr. Semenza sat in that chair and smiled. I think he likes to concoct this type of monstrosity."

The court then proceeded to review the sequence of events laid out in the government's trial memorandum, suggesting at intervals how they could have been divided into separate conspiracies for purposes of prosecution (in some instances in other judicial districts), noting the unavailability of many of the defendants for trial, and continuing its criticism of the United States Attorney (App. C, *infra*, 31a-34a).[5] Concluding this review, the court stated (*id.* at 34a):

> I haven't done any research, but I am going to grant the motion [to acquit] based on the, and it is so ordered that it is granted, based on the opening statements and the trial brief, on the grounds that the court had no jurisdiction. And on the further ground that this type of a monstrosity, unmanageable monstrosity, does not have to be tried by Federal Judges.[6]

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[5] See, *e.g.*, App. C, *infra*, 31a:

> Most prosecutors, ninety-nine out of a hundred lawyers that have any logic in their mind would have said, "Okay, that is one charge." * * * That is just the beginning of Mr. Semenza's dream.

The court added *(ibid.)*: "I really wish the press were here, perhaps that is just as well."

See also App. C, *infra*, 34a:

> The theory, of course, in this mind of Mr. Semenza's "Yes, that they are working for Combs" [the "mastermind" of the conspiracy charged]. Well Combs might have a hundred and fifty other people working for him, importing, I don't know, it could be a half dozen other things not only involving controlled substances. * * * But, if you follow the logic, the illogic of the mind of our United States Attorney, that is all one great conspiracy. It is ridiculous. * * * I fell for it once. Damn near had a nervous breakdown with that trial. It should have taken two or three weeks and I let one Los Angeles lawyer voir dire the jury and three days later, we are still trying to get a jury. I remember that very well.

[6] At this juncture the court complained about what it regarded as the subservience of grand juries to prosecutors and the rendition of indictments based on hearsay evidence (App. C, *infra*, 34a). In the latter connection the court acknowledged this Court's decision in *Costello*

The district court continued (*id.* at 35a):

> [T]his type of conspiracy is unmanageable trialwise. I don't know if there is any case law to support me, I think that a trial judge is not an umpire and courts have said this. A Federal trial Judge can participate to the extent it is necessary to bring order out of chaos, and to the extent that it is necessary to a fair trial and comment on the evidence and so forth. He has management powers, he is not an umpire calling all the balls and strikes as some of our poor state courts.
>
> And when something like this comes in, the court has the inherent authority I am going to hold * * * to dispose of this kind of thing. It is quite apart from jurisdiction.

Foreseeing the likelihood of a government appeal from its action, the district court was vague about the legal ground for the ruling (*ibid.*):

> I will allow counsel to think about it and read what the government says in their brief if they do take it to appeal and then leave open any other reasons to support me. But it is the kind of thing that should not be tried or allowed.

In view of its criticism of the United States Attorney, the court stated to the Assistant United States Attorneys prosecuting the case (App. C, *infra*, 36a): "I don't expect a response from government counsel, you have got to be loyal to the man you are working for." The prosecutors nevertheless sought leave to go forward with their evidence, arguing that they would be able to establish the existence of a single overall conspiracy, and observing that if the government failed to sustain its burden in this regard a motion for acquittal could be granted at the close of the government's case. The court declined to consider this procedure, stating (*ibid.*), "I am not going to waste two or three weeks. I have got other things to do and so have you and the other counsel." The court appeared to acknowledge that whether the acts charged were part of a single conspiracy

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v. *United States*, 350 U.S. 359 (1956), but commented (App. C, *infra*, 34a): "It's going to change, it's going to have to."

was a factual question (*id.* at 37a-38a). The court insisted, however (*id.* at 38a):

> You are misunderstanding, I am not saying there is no theory * * * for this. I say it is a monstrosity, it is unmanageable, it is not the kind of thing that a court has to put up with and it should be broken down.

After advising the prosecutors in considerable detail as to how the prosecution should have been handled (App. C, *infra*, 38a), the court again refused to allow the government an opportunity to prove that the overall conspiracy charged had occurred, making clear that it was unwilling to try the case in any event (*id.* at 39a; emphasis added):

> You are not going to offer any evidence. *If the Court of Appeals reverses this finding and sends it back for trial, I won't try it.* I will find some young Judge that has got more patience and energy than I have, to come in and try it.

The district court never explained what it was that would make the trial of Brown, Work, and Snyder on the conspiracy indictment returned by the 1976 grand jury unmanageable. In discussing a prior experience with a multi-defendant drug conspiracy trial, the court made clear that it preferred that the case be tried elsewhere (App. C, *infra*, 40a). The court appears, moreover, to have lost sight of the fact that there were only three defendants before it for trial (*id.* at 39a):

> THE COURT: * * * I don't think that the court has to sit carte blanche—let's suppose that somewhat like the [earlier] case that all the defendants were found here and they all had different lawyers. Have you ever been through one of those? Mr. Sheridan [counsel for defendant Snyder], I know you better than those other gentlemen. Have you ever seen one of those tried?
>
> MR. SHERIDAN: Yes, your honor.
>
> THE COURT: They are horrible. They are unmanageable. You've got how many defendants, eleven?
>
> MR. SHERIDAN: Thirteen, I think and seventeen unindicted co-conspirators.
>
> THE COURT: You have got eleven cross-examiners for each witness. * * *

The court acknowledged (App. C, *infra*, 39a) that massive conspiracies do exist, and did not explain why the three defendants before it should not go to trial upon the indictment. Instead, the court again suggested that the case should have been prosecuted elsewhere, renewed its sharp criticism of the United States, and finished with a suggestion that it commence general supervision of the prosecutorial decisions of the United States Attorney (*id.* at 40a; emphasis added):

> [N]o, you see they all came from Las Vegas and that is how I got [this case]. Another one of Mr. Semenza's Alice in Wonderland dreams. And they are that. They are ridiculous in concept. I don't know what the matter is, I don't know how he thinks. I think he has some kind of sense of delight in conjuring these things up, creating these massive puzzles and saying, "Let's see how Judge Foley can handle that." I don't know what is going on, but I will tell you this much, I'm not going to put up with it any more. *Please God, we'll have a change of administration and he'll be gone.*[7] I don't know about that either, but *I'm not going to put up with Semenza any more.*
>
> *So I won't try this.* If the Court of Appeals should say that I am wrong, I don't think they are going to, and this case comes back, I won't try it. And I won't try any more of Larry Semenza's cases that are this ill. *I'm going to have to work out some system when I get copies of the indictment where I can demand in advance a trial brief so I can see what we are into before we go through all the time and energy, the motion stage and impanelling the jury and so forth.*

The motions for acquittal were granted (*id.* at 41a).

c. The government took an appeal from the judgments of acquittal, arguing that there would be no Double Jeopardy bar to further proceedings after the "acquittal" because the grounds for acquittal had no bearing on the question of guilt or innocence, and the "trial" had been a sham. On May 4, 1977, however, the court of appeals dismissed the gov-

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[7] These proceedings occurred shortly before the 1976 presidential election.

ernment's appeal on double jeopardy grounds (see App. A, *infra*, 9a).[8]

2.a. As previously noted, proceedings directly involving respondent commenced when he surrendered to federal authorities in August 1980. Respondent moved to dismiss the indictment for the reasons given by the district court in acquitting Brown, Work, and Snyder in 1976. Respondent also argued that the trial would be protracted, with many government witnesses and an extensive defense case, and that such a prosecution was unwarranted given what he characterized as his minor role in the alleged conspiracy. Finally, respondent urged that the government was collaterally estopped from opposing dismissal by the order entered in the earlier prosecution.

The district court granted the motion to dismiss on December 17, 1980 (App. B, *infra*, 24a-26a). The court declined to rely upon collateral estoppel (*id.* at 25a) and appears to have eschewed any suggestion that the indictment charged multiple conspiracies or that venue was improper, relying exclusively upon the supervisory power rationale for dismissal asserted in 1976 (*id.* at 26a; citations omitted):

> This court is well aware that a conspiracy prosecution may be brought in any district in which any act in furtherance of the conspiracy was committed by any of the conspirators, even though some of them were never physically present there. * * * And the actions in Las Vegas of Ernest Franz Combs, Jr., an indicted coconspirator, could be used to establish the necessary overt act within this district. However, the problem in *Brown* [the prosecution of Brown, Work and Snyder] was that the indictment was such a complex monstrosity that this Court decided that it should have been broken down into several smaller more manageable indictments. There was simply no good reason for those defendants to be indicted in this district given their alleged roles in the government's conspiracy theory. This Court is confronted with that same problem with the indictment against Gonsalves.

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[8] The court of appeals, of course, acted without the benefit of *United States* v. *Scott*, 437 U.S. 82 (1978).

> Therefore, for the reasons articulated in this Court's September 21, 1976 order and judgment of acquittal as to defendants Brown, Work and Snyder, this Court hereby exercises its discretionary supervisory powers and dismisses the indictment as against Gonsalves.[9]

b. The government appealed and, nearly two years later, the court of apeals affirmed. It stated: "Our task is to determine whether the dismissal of the indictment was a proper exercise of supervisory power by the district court" (App. A, *infra*, 10a). The court of appeals recognized that the dismissal of the indictment in this case did not rest upon any infringement of respondent's legal rights (*id.* at 10a, 13a, 14a). Nevertheless, the court espoused a broad doctrine of supervisory authority vested in the district courts "to do justice in particular fact situations" (*id.* at 11a). Recognizing that dismissal of an indictment absent legal grounds for doing so may "encroach on the prosecutor's prerogatives" (*id.* at 12a) and implicate separation of powers concerns (*id.* at 14a), the court invoked a principle of "checks and balances," said to be implicit in the Constitution, as a source of supervening authority (*id.* at 15a-16a). Citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), and *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), the court stated (*id.* at 16a): "It is clear that Article III authorizes the judicial branch to review the operations of the executive and legislative branches" and concluded (*ibid.*):

> The judiciary therefore should use its supervisory power to maintain its own institutional integrity, including the ability to administer an effective criminal justice system * * *

Turning to the particular case presented, the court of appeals stated: "The District Court in this case had ample factual and legal basis upon which to conclude that the indictment pursued by the prosecutor constituted a serious intrusion into the judiciary's interest in the fair administration of the criminal justice system" (*id.* at 19a). It suggested that the transcript of the district court's 1976 oral

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[9] Only a minute order records the 1976 disposition. Accordingly, the court must have intended to invoke its oral ruling.

ruling acquitting defendants Brown, Work, and Snyder reflected the judge's experience with the problems of managing "massive conspiracy trials" (*id.* at 18a). The court also invoked Second Circuit decisions noting the risks of appellate reversal created by use of broad conspiracy indictments (*id.* at 18a-19a).

The court of appeals explained its conclusion that dismissal was warranted here only in the most general terms (App. A, *infra*, 19a-20a; footnote omitted):

> Our own review of the record, and indeed our mere recitation of the elaborate facts of the conspiracy outlined in the indictment * * * show that the facts here justified the conclusion that to allow prosecution on this indictment would "gravely impair the basic function of" the District Court.
>
> The court was not required to ignore the practical considerations attendant to a trial of this size and complexity, *e.g.*, the innumerable pretrial motions, the occupation of weeks of the court's busy calendar, the superhuman tasks facing the jury and the likelihood of a mistrial. On the facts of this case the judge had a solid basis upon which to find the prospect of these horrors real and the resulting disruption of the judicial process great.

Purporting to apply a balancing test weighing these considerations against the value of prosecutorial discretion (*id.* at 20a), the court of appeals concluded that "the degree of encroachment upon the prerogatives of the prosecutor that a dismissal entails in this case is minimal" because the dismissal was without prejudice and left the prosecutor free to seek reindictment upon terms charging separate conspiracies of less global scope in other venues (*id.* at 20a & n.13).

REASONS FOR GRANTING THE PETITION

The dismissal of the indictment in this case was not based on any finding that it failed to state an offense triable in the United States District Court for the District of Nevada or that trial on the indictment would violate any right of respondent's. Rather, it was based on vaguely identified "supervisory powers" and considerations of judicial convenience. By upholding the dismissal, the decision of the court

of appeals effects an unprecedented shift of authority to determine whether and against whom criminal charges should be brought, and the nature of those charges, from the Executive Branch (and the grand jury), where it has heretofore resided, to the district courts. This transfer finds no support in the decisions of this Court identifying the limits and purposes of the supervisory power and is contrary to this Court's teaching that "[t]he supervisory power merely permits federal courts to supervise 'the administration of criminal justice' among the parties before the bar." *United States* v. *Payner*, 447 U.S. 727, 735 n.7 (1980), quoting *McNabb* v. *United States*, 318 U.S. 332, 340 (1943). Nor has any decision of any other court of appeals purported to arrogate a similar authority to the judiciary.

The court of appeals' decision is also contrary to other fundamental principles established by this Court's decisions. First, the court of appeals' decision disregards the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817 (1976); see also *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964). Second, the court of appeals' reasoning that dismissal of the indictment was permissible because different charges could still be proffered in other venues ignores the fundamental rule of prosecutorial discretion:

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

Bordenkircher v. *Hayes*, 434 U.S. 357, 364 (1978). Accordingly, the district courts do not possess authority— however it may be labeled—to determine that trial of defendants upon legally valid charges pressed by the prosecutor and the grand jury would impose an undue burden upon the courts.

Even if such authority were available in extraordinary circumstances, the record of this case provides no basis for its application. It is inconceivable that the trial of a *single*

defendant upon a two-count indictment could present an unmanageable task for the district court. Indeed, neither the district court nor the court of appeals identified any basis in the record of this case for concluding that the trial would entail unusual difficulties. Moreover, the record reveals with painful clarity that the true basis for the district court's ruling was its view that the prosecutorial practices of the government generally should be subject to its control, together with the individual trial judge's disapproval of the United States Attorney's prosecutorial policies.

1.a. There is no precedent for the exercise of supervisory power sanctioned by the court of appeals in this case. It is established that supervisory power does not arm "the federal judiciary [with] a 'chancellor's foot' veto over [prosecutorial] practices of which it d[oes] not approve" (*United States* v. *Russell*, 411 U.S. 423, 435 (1973)). As the Court stated in *Russell* (*ibid.*; emphasis added):

> The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce *those* limitations.[10]

As the Court cautioned in *Payner*, *supra*, 447 U.S. at 735 n.7, quoting *McNabb* v. *United States*, *supra*, 318 U.S. at 332, "[t]he supervisory power merely permits federal courts to supervise 'the administration of criminal justice' among the parties before the bar." There is no suggestion in this Court's decisions (or those of the other courts of appeals) that supervisory authority exists to determine which

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[10] The Court's comments in *Russell* were made in the course of rejecting the suggestion that it give extra-constitutional, extra-statutory scope to the entrapment defense—in other words, that it invoke a supervisory power.

parties should be prosecuted or to determine (other than by reference to the pertinent legal rights of defendants) what the charges against them should be.[11]

That the decision of the court of appeals overstepped the confines of the supervisory power doctrine is confirmed by this Court's recent decision in *United States* v. *Hasting*, No. 81-1463 (May 23, 1983). There the Court described the supervisory power as allowing federal courts "*within limits*, [to] formulate *procedural rules* not specifically required by the Constitution or the Congress" (slip op. 6; emphasis added). Of course, the dismissal of a legally valid indictment, sanctioned by the court of appeals in this case, rests not upon some rule governing the conduct of proceedings before a court, but upon the district court's view that trial of the case itself does not comport with the public interest. That such a determination overreaches the boundaries of the courts' supervisory authority is evident from consideration of the purposes of the supervisory power doctrine identified by the Court in *Hasting* (slip op. 6; citations omitted):

> The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights * * *; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury * * *; and finally, as a remedy designed to deter illegal conduct * * *.

None of these purposes is served by the dismissal of this case. The courts below did not purport to identify any vio-

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[11] To the extent the court of appeals relied (App. A, *infra*, 18a-19a) upon the Second Circuit's decisions in *United States* v. *Sperling*, 506 F.2d 1323, 1340-1341 (1974), cert. denied, 420 U.S. 962 (1975), and *United States* v. *Bertolotti*, 529 F.2d 149 (1975), that reliance was misplaced. In *Sperling* the court of appeals merely cautioned the prosecutor that whenever the link between episodes of a larger conspiracy is tenuous, there is a risk of appellate reversal of convictions secured upon the global conspiracy charge. 506 F.2d at 1340-1341. And in *Bertolotti* convictions were reversed because the court of appeals found "no evidence linking [the illegal transactions charged] together in a single overall conspiracy." 529 F.2d at 155. The Second Circuit did not suggest on either occasion that the district court possessed supervisory authority to prevent the government from seeking to prove its case, which is what the district court did here.

lation of respondent's rights that would result from bringing him to trial upon the indictment in this case. And the rationale of the court of appeals for sanctioning dismissal bears only a semantic resemblance to the judicial integrity concerns recognized in *Hasting*, for neither court below identified any consideration that would have been improperly presented to the jury simply because respondent was to be tried upon the pending indictment. Finally, there is no suggestion whatsoever that the prosecution of this case involves illegal conduct by prosecutors or other law enforcement personnel.

b. The court of appeals' premise that supervisory power may be employed to dismiss indictments where trial would impose burdens upon a district court that are, in that court's judgment, unwarranted, distorts the role of the federal courts in our constitutional system. It does not denigrate the role of the judiciary to remember that the function of the federal courts is "to say what the law is" with respect to the cases before it, *Marbury* v. *Madison*, *supra*, 5 U.S. (1 Cranch) at 177, and to apply the law thus determined to the facts of those cases as they are found to be. In *United States* v. *Nixon*, 418 U.S. 683, 707 (1974), the Court recognized "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." This duty plainly cannot be fulfilled by refusal to try cases that the courts determine to be unduly time consuming. On the contrary, the obligation of the federal courts to exercise the jurisdiction given them is "virtually unflagging." *Colorado River Water Conservation District* v. *United States*, *supra*, 424 U.S. at 817.[12] Here, moreover, the jurisdiction of the district court is exclusive and absolute. 18 U.S.C. 3231 provides in pertinent part:

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[12] To be sure, the holding of *Colorado River Water Conservation District* was that the district court had properly declined to exercise its jurisdiction in favor of concurrent proceedings in state court. But the Court stressed that the circumstances presented were "exceptional." 424 U.S. at 818. More importantly, the issue was whether the water rights involved would be adjudicated in state or federal proceedings; there was no suggestion that a federal court might decline to exercise its jurisdiction when the result would be to preclude altogether a determination of rights or liabilities.

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

The dismissal of the indictment in this case is accordingly "at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.'" *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964), quoting *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40 (1909).

The court of appeals grounded its decision upon the assertion that "Article III authorizes the judicial branch to review the operations of the executive and legislative branches" (App. A, *infra*, 16a). This fundamental premise is erroneous. Article III empowers the federal courts to decide only cases or controversies. In doing so, the courts are authorized "to say what the law is," *Marbury* v. *Madison*, *supra*, 5 U.S. (1 Cranch) at 177, and thus to declare that an Act of Congress is unconstitutional, or that an executive act is unauthorized by Constitution or statute, as in *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 585-589, or is otherwise contrary to law. But neither these cases, upon which the court of appeals relied (App. A, *infra*, 16a), nor any other authority of which we are aware, suggests that the courts are established to oversee the functions of the Executive or Legislative Branches generally, or specifically to review the prosecutorial discretion of the United States Attorneys.[13] Nor does the principle of "checks and balances" that the court of appeals invoked as a counterweight to the doctrine of separation of power (*ibid.*)

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[13] We note that the court of appeals' analysis in this aspect rests primarily upon a student law review note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 Stan. L. Rev. 427 (1982), the burden of which is that *United States* v. *Payner*, *supra*, was wrongly decided by this Court. 34 Stan. L. Rev. at 449-451, 452.

support such general supervision of the prosecution by the district court. That concept is merely descriptive of the arrangements embodied in our Constitution. It has been applied, *inter alia*, to describe the function of judicial review. It may also plausibly be applied to describe the exercise of the courts' powers under the Constitution and various statutes and rules that govern criminal proceedings—and in that special sense to check the power of the Executive as prosecutor and to hold Congress to constitutional limits in defining offenses. But the structural principle of checks and balances said to be embodied in our Constitution plainly cannot form an independent source of authority for any branch to exercise discretionary control over the activities of another branch, lest the actual allocation of authority in the Constitution be disrupted.

c. The court of appeals reasoned that the district court's dismissal of the indictment in this case does not seriously impair the prerogatives of the prosecutor because the government remains free to indict on charges differently framed, in other venues (App. A, *infra*, 20a & n.13). The court of appeals' reasoning fails, however, to recognize that the constitutional authority of the Executive, exercised through the prosecutor in conjunction with the grand jury, extends not only to deciding whether to prosecute, but also to the "select[ion] [of] the charges against the accused." *United States* v. *Goodwin*, No. 80-2195 (June 18, 1982), slip op. 11 n.11. As the Court explained in *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978):

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

See also *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979); *United States* v. *Nixon*, *supra*, 418 U.S. at 693, citing with approval *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965); cf. *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457-459 (1869). The decision of the court of appeals thus cuts to the heart of the prosecutor's constitutional independence. It also undercuts

the constitutional role of the grand jury in determining what offenses are to be charged.

The decisions of other courts of appeals recognize that the prosecutor's charging decisions are not subject to judicial oversight—no matter what the procedural device by which it is sought. *United States* v. *Brown*, 481 F.2d 1035, 1043 (8th Cir. 1973) (*sua sponte* dismissal of indictment); *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973) (civil action to compel federal prosecution); *Newman* v. *United States*, 382 F.2d 479 (D.C. Cir. 1967) (appeal from conviction based upon prosecutor's acceptance of co-defendant's guilty plea to lesser offenses); *Smith* v. *United States*, 375 F.2d 243, 247 (5th Cir. 1967) (Federal Tort Claims Act suit); *Powell* v. *Katzenbach*, 359 F.2d 234, 235 (D.C. Cir. 1965) (mandamus to compel prosecution); *United States* v. *Cox*, *supra* (order directing United States Attorney to draft and sign indictment). Each of these cases reflects an understanding of the respective roles of court and prosecutor that is at odds with the view of the Ninth Circuit in this case.

d. In addition to the limitations upon the scope of the supervisory power previously addressed, that power is limited by the paramount authority of Congress to establish, within constitutional limitations, practices and procedures and substantive rules to govern proceedings in federal courts. See, *e.g.*, *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959). The decision of the court of appeals, however, effectively overrides the pertinent provisions of federal law that establish grounds for dismissal of an indictment and related procedures in managing a criminal trial. As previously noted, the discretionary power of dismissal (unrelated to rights of the defendant) announced by the courts below is inconsistent with 18 U.S.C. 3231, which vests the district courts with jurisdiction over all offenses against the United States. Absent specific legal grounds for dismissal of an indictment, such as failure to state an offense, the assumption of vaguely defined "supervisory power" to dismiss the indictment here is contrary to that grant of jurisdiction, as well as to the substantive provisions that define the offenses charged, and the statutory provisions

punishing conspiracy to commit those offenses, 21 U.S.C. 846 and 963.

In addition, the supervisory authority claimed by the district court effectively circumvents the provisions of the Federal Rules of Criminal Procedure that govern the contents of indictments (Rule 7), the joinder and severance of offenses and defendants (Rules 8 and 14), and permissible venues for prosecution (Rule 18; see also 18 U.S.C. 3237). Neither the district court nor the court of appeals identified any legal defect under these provisions or other previously recognized legal principles that would warrant dismissal of the indictment. Thus, the decision of the courts below "confer[s] on the judiciary discretionary power to disregard the considered limitations of the law that it is charged with enforcing." *United States* v. *Payner*, *supra*, 447 U.S. at 737. "[T]he supervisory power does not extend so far." *Ibid.*

e. The decision of the court of appeals proceeds upon the erroneous supposition that the supervisory power claimed by the district court must be made available to ensure that federal prosecutors do not destroy the courts' "ability to administer an effective criminal justice system" by initiating unmanageable prosecutions (App. A, *infra*, 16a). There is no warrant for this remarkable assumption. On the contrary, the Department of Justice and the United States Attorneys have every incentive to ensure that complex indictments are not obtained except to the extent necessary and appropriate in carrying out their constitutional duty to "take Care that the Laws be faithfully executed" (Art. II, § 3). The resources and personnel of federal prosecutors, like those of the judicial branch, are limited.[14] Given these limited resources, federal prosecutors, confronted by the

[14] It bears mentioning that the alternatives to a complex, multi-defendant indictment as a means of prosecuting a large-scale conspiracy are either to refrain from indicting many persons believed to have committed serious crimes or to break up the offense into a number of separate indictments, each to be separately tried (as the district court apparently would have preferred here). It is far from obvious, to say the least, that multiple trials requiring many of the same witnesses to testify about the same core events would realize the goal of economic allocation of scarce criminal justice resources.

lash of the Speedy Trial Act, have powerful reasons to be selective about the matters presented to a grand jury.[15] Even apart from constitutional considerations, it is the prosecutor who is best situated to make necessary decisions about the relative priority of various cases and to determine whether the public interest in effective administration of the criminal justice system as a whole will be served by going to trial upon a particular indictment. See *United States* v. *Lovasco*, 431 U.S. 783, 792-795 (1977). Conspicuous by contrast is the "lack of judicially discoverable and manageable standards" (*Baker* v. *Carr*, 369 U.S. 186, 217 (1962)) by which courts can make these decisions.

The court of appeals noted that the hazards of going to trial upon the indictment in this case include the possibility of juror confusion and the likelihood of a mistrial (App. A, *infra*, 20a & n.12). Neither of these outcomes serves the prosecutor's interest. If the evidence does not support conviction of one or more defendants in a multiple defendant conspiracy case, appellate reversal will follow. See, *e.g.*, *United States* v. *Bertolotti*, *supra*. A mistrial also leads to wasteful expenditure of scarce prosecutorial resources. There is no reason to believe that federal prosecutors are so insensitive to these hazards, and to the other incentives for selectivity in prosecution that confront them, that it is necessary to invent a wholly unprecedented supervisory power to prevent the filing of unnecessarily complex indictments.

2.a. Even if supervisory power were available in appropriate cases to dismiss indictments determined to impose undue burdens upon judicial resources, there was no basis whatsoever in the record of this case for that extreme measure. Neither the court of appeals' opinion nor the district court's oral ruling identifies any satisfactory basis for dismissal of the indictment. The court of appeals noted (App. A, *infra*, 20a; footnote omitted) the following "practical considerations attendant to a trial of this size and complexity":

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[15] Significantly, 18 U.S.C. 3161(h)(8)(C) makes clear that trial delay attributable to calendar congestion is not excludable from Speedy Trial Act reckoning.

> innumerable pretrial motions, the occupation of weeks of the court's busy calendar, the superhuman tasks facing the jury, and the likelihood of mistrial.

But the court of appeals did not explain why this case, more than any other conspiracy charge, entails these hazards. It plainly cannot be the law that those who commit complex offenses are immune from prosecution for the full scope of their criminal activity. Moreover, the indictment in this case is not in fact unusually complex, given the nature of the offenses found by the grand jury to have probably been committed. The court of appeals, however, gave no consideration to the nature of those offenses and the typically elaborate patterns of international drug trafficking in upholding dismissal of the indictment.

There are no special factors in this case that suggest an unusually complex or difficult motion practice. And while we do not minimize the burden of a major trial upon a busy court's calendar, it is the role of the courts to shoulder this burden.[16] We are particularly puzzled by the court's invocation of the problem of juror confusion and the likelihood of mistrial. Both courts below appear to have lost sight entirely of the fact that respondent was to be the only defendant at his trial.[17] Even if there had been multiple defendants, there would be no basis to question the district court's ability to instruct the jury carefully as to the need properly to determine the guilt of each individual defendant in a conspiracy case, an everyday occurrence in the federal courts. Accordingly, the court of appeals utterly failed to identify any consideration that sets this case apart from a host of cases that are regularly tried by the district courts.

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[16] There is no suggestion in the record that the district court was actually unable to find time to try this case. We note, in any event, that Congress has made provision for the temporary reassignment of judicial personnel within the federal system whenever that is necessary to ensure that judicial business is accomplished. See 28 U.S.C. (& Supp. V) 291(b), 292(b) and (d), and 294.

[17] See, *e.g.*, App. A, *infra*, 18a:

> Of course, this problem—of the Government attempting to force as many defendants as possible to trial in the same proceeding on the claim of a single conspiracy * * * is one not faced by judges in this circuit alone.

Nor did the district court identify any special considerations that warranted its refusal to try this case when it granted "acquittals" to defendants Brown, Work and Snyder in 1976. Insofar as the court commented on this subject at all, it pointed to particular difficulties experienced in other cases that do not reflect any problem of inherent unmanageability, especially on the facts of the present case. The court singled out the problem of repetitive cross-examination (see pages 8-9, *supra*), but that had relatively little bearing on the trial of Brown, Work and Snyder, and has no bearing on the present case. In any event, the federal courts possess authority to limit repetitive cross-examination.[18] Contrary to the district court's suggestion (see page 7, *supra*), the availability of such authority to manage the proceedings before the court undercuts the claimed authority simply to dismiss cases presenting management difficulties. See *United States* v. *Hasting*, *supra*, slip op. 6-7 & n.5; *United States* v. *Morrison*, 449 U.S. 361 (1981).

b. The district court's recitation of grounds for invocation of supervisory authority to dismiss the indictment in this case raises concerns that go beyond its failure to identify special circumstances that would warrant that extraordinary relief under the court of appeals' analysis. The district court's announced intention to commence general supervision of the contents of indictments (App. C, *infra*, 40a) is utterly inconsistent with the constitutional independence of the prosecutor. And it is perfectly clear from the district

[18] Rule 611(a), Fed. R. Evid., gives the district courts broad discretion to regulate "the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time * * *." The courts of appeals have repeatedly held that it is within a trial judge's discretion to bar unnecessary duplicative cross-examination of government witnesses at multi-defendant trials. See, *e.g.*, *United States* v. *Coven*, 662 F.2d 162, 170 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982); *United States* v. *Praetorius*, 622 F.2d 1054, 1061 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980); *United States* v. *Miller*, 463 F.2d 600, 601 (1st Cir.), cert. denied, 409 U.S. 956 (1972); *Amsler* v. *United States*, 381 F.2d 37, 51 (9th Cir. 1967). See also 3 J. Wigmore, *Wigmore on Evidence* § 782, at 183 (Chadbourn rev. 1970).

court's remarks (*id.* at 31a, 38a, 41a) that the court intended to impose upon the prosecutor its own notion of good prosecutorial practice. Equally disturbing are the repeated statements by the district court that reflect its personal disapproval of the individual United States Attorney's prosecutorial policies. These considerations, which appear to have influenced the district court's ruling, have no place in the exercise of judicial authority.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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MAY 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 80-1860

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

STEPHEN A. GONSALVES, DEFENDANT-APPELLEE

Argued and Submitted Aug. 3, 1981.

Decided Nov. 9, 1982.

Appeal from the United States District Court for the District of Nevada.

Before ELY and NORRIS, Circuit Judges, and PECKHAM,* District Judge.

PECKHAM, District Judge:

The Government appeals from the District Court's order of December 17, 1980, granting the motion to dismiss the indictment on behalf of appellee-defendant Stephen Anthony Gonsalves. Appellee had been charged along with twelve other defendants and seventeen unindicted coconspirators for violation 21 U.S.C. § 963, Conspiracy to Import a Controlled Substance, and 21 U.S.C. § 846, Conspiracy to Possess with Intent to Distribute a Controlled Substance. Gonsalves' alleged role was to act as a money courier in one of the numerous financial transactions that took place during the course of the charged conspiracy.

Four years earlier, the District Court had ordered a judgment of acquittal in favor of three of appellee's coconspirators who had been brought to trial on the same indictment. Gonsalves had not been arrested as of that time. However, on August 28, 1980, he surrendered to the United States magistrate in Las Vegas, Nevada. On Sep-

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*Honorable Robert F. Peckham, Chief United States District Judge, Northern District of California, sitting by designation.

tember 26, 1980, he filed a motion to dismiss the indictment on the same grounds that had supported the previous judgment of acquittal in favor of three of his alleged co-conspirators.

The District Court, relying on its inherent supervisory power to prevent undue interference with the effective administration of justice, granted the motion on the grounds that, *inter alia*, the indictment was an "unmanageable monstrosity." Under the particular facts of this case, and for the reasons set forth below, we affirm the District Court's order of dismissal pursuant to its proper excercise of supervisory power.

The Government has alleged an elaborate on-going conspiracy to import and distribute a controlled substance during the period of January 1, 1973, to June 18, 1974. The two-count indictment names a total of thirteen defendants, Gonsalves among them, as well as seventeen co-conspirators who were not named as defendants. According to the Government, these individuals were engaged in a conspiracy to import and distribute hashish purchased from England, the Netherlands, and other countries in Europe and the Middle East. The Government alleges that the following scenario took place.[1]

In February of 1973, Ernest Franz Combs contacted James Earl Gater in South Lake Tahoe, California. Combs told Gater that, with the help of James Morris and others, he was going to smuggle hashish from Europe into the United States. In particular, Morris was to get some acoustical sound speaker cabinets specially manufactured so that fiberglass sections filled with hashish could be fit into them. After the cabinets were manufactured in England, they were shipped to France where they were picked up by Robert David Work, among others, and then loaded with hashish.

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[1] We emphasize that none of these charges have been established by evidence. Upon review of an order dismissing an indictment, however, the indictment must be tested by its sufficiency to charge an offense. *United States* v. *Sampson*, 371 U.S. 75, 78-79, 83 S.Ct. 173, 174-175, 9 L.Ed.2d 136 (1962). We must, therefore, accept all of the Government's allegations as true of the purposes of this appeal.

Morris shipped the hashish-filled speaker cabinets from Paris, France, to New York City on March 4, 1973. From there they were shipped to Los Angeles. Gater was to meet Richard Kenneth Brown at the Orange County Airport in California and then proceed to a warehouse in San Pedro, California, where the cabinets were to be delivered and unloaded. Brown had given Gater a carnet which he was to show to the customs officials at Trans World Airlines (TWA) Air Cargo at the Los Angeles International Airport in order to pick up the cabinets.

On March 8, 1973, Gater picked up the hashish-filled sound speaker cabinets at the Los Angeles airport in a rented U-Haul truck and transported them to the warehouse in San Pedro where Gater, Brown, and Work unloaded 724 pounds of hashish. After unloading the cabinets, Brown gave Gater a kilo of hashish as compensation for picking up the equipment. Furthermore, because Gater had been involved in the operation, Combs told him that, if he desired, he could invest between twenty and thirty thousand dollars on the next shipment and receive a share of the proceeds.

In early March of 1973, Combs again contacted Gater and instructed him to go to Austria and rent a house that would be used to collect the hashish. Combs agreed to allow Gater to invest $20,000.00 in this venture. Combs told Gater that Robert Carl Fry was to receive $50,000.00 to assist Gater in Austria. Combs also explained that Gater was to fly to Graz, Austria, and meet with Salim Inard Hraoui.

On March 12, 1973, Gater flew from South Lake Tahoe to the Orange County Airport where he was picked up by Brown. They went to Brown's house where Gater was given approximately $300,000.00 in cash to take with him to Graz. In Graz, Gater met with Karl Ferdinand Krug who assisted him in finding a house to rent. After renting the house, Fry arrived and Gater gave him the $300,000.00 which he was to use to purchase the hashish. Thereafter, the hashish was purchased and was brought to the house for packing in the sound speaker cabinets. During this period, Combs persuaded Gary Lynn Lickert to rent a U-Haul truck and drive to San Pedro. Lickert loaded ten speaker

cabinets on the truck and delivered them to TWA air freight to be sent to London, England.

The ten cabinets, along with other pieces of equipment, were shipped by Raymond Barry Mayo from London to Austria. Mayo then traveled to Austria where he and Hraoui picked up the equipment and delivered it to the house that Gater had rented. Gater, Fry, Mayo, and Hraoui then loaded the ten sound speaker cabinets with hashish and shipped them from Austria to Philadelphia, Pennsylvania.

After this transaction, Fry had $120,000.00 left out of the $300,000.00 sent by Combs to Austria to purchase hashish. Fry gave the remaining money to Gater. The Government claims that appellee Gonsalves instructed Gater to give the money to Kent Giles Snyder.

After the cabinets had been shipped, Gater went back to the United States where he met up with Snyder, Morris, and Kenneth Graham Plinston. Upon arrival in the United States, Gater went first to Brown's house and then to Comb's house. Gater was paid $25,000.00 for his share of this deal from Snyder.

In the latter part of May 1973, Combs asked Harold Adrian Armstrong to take $140,000.00 in cash to London. Combs instructed Armstrong to purchase a special suitcase to carry the money. Gonsalves delivered the $140,000.00 in cash to Armstrong which was to be given to Plinston in London. After delivering the money, Armstrong returned to the United States.

At the end of June 1973, Gater was again instructed to go to Austria to consummate another hashish deal. Accordingly, Gater and Brenda Marie Sibson went to an apartment in Newport Beach where they were met by Brown and Combs. There, Combs gave $260,000.00 cash to Gater to take to Austria.

On July 3, 1973, Klaus Warner met Gater and Sibson in Graz, Austria. Warner gave Gater the keys to a vehicle containing 140 kilograms of hashish, whereupon Gater paid Warner $50,000.00 cash. Gater, Sibson, and Mayo then loaded 420 kilograms of hashish in fiberglass inserts which

were placed inside twelve accoustical sound speaker cabinets.

A few days later, Mayo shipped twenty-three pieces of sound equipment, including the twelve speaker cabinets, to Chicago, Illinois, and retrieved the shipment there on July 18. Mayo then shipped the speakers to Las Vegas.

On August 21, 1973, Gater, Sibson, Mayo, and Richard Jonathan Vickers loaded 500 pounds of hashish into sound speaker cabinets in Italy. Thereafter, Vickers and Mayo shipped thirty-four pieces of sound equipment, including the speaker cabinets, to San Francisco. Morris received the shipment at the San Francisco International Airport. On August 31, Combs had Lickert take $297,000.00 in cash to Amsterdam, Holland, and deliver the money to Gater and Dennis Howard Marks.

In early September 1973, Gater, Marks, and others packed 820 pounds of hashish into sixteen sound speaker cabinets. That same day, Allen Richard White shipped twenty-nine pieces of sound equipment, including the sixteen sound speaker cabinets, from Holland to Detroit, Michigan. Instead of being sent to Detroit, however, the cabinets were sent through New York to Las Vegas. It was at this point that the Government began its investigation. On September 13, 1973, a United States Customs dog at John F. Kennedy Airport in New York reacted to an odor being emitted from a large wooden chassis of one of the sound speaker cabinets. United States Customs Inspectors opened the speaker cabinet and found sixty pounds of hashish in the chassis of the speaker. An investigation determined that the speaker cabinet they discovered was one of the twenty-nine pieces of freight destined for Las Vegas.

Investigation further disclosed that the remaining twenty-eight pieces were on a TWA flight which was to arrive in Las Vegas on September 13, 1973, at 12:37 p.m. The shipment of the twenty-eight pieces had originated in Amsterdam and arrived at JFK International in bond shipment. The shipment was consigned to D & N Delivery Corporation, McCarran International Airport, Las Vegas, for delivery to Trans Atlantic Sound, Las Vegas. Special Agent Fowler of the Drug Enforcement Administration

(DEA) in New York notified the Special Agent in charge at Las Vegas of these events. Special Agent Harlan Bowe arrived at TWA freight at McCarran International on the afternoon of September 13, 1973. Bowe, other DEA agents, and a United States Customs Agent were directed to a TWA agent who in turn directed the Customs agents to a Pan Am air freight transportation crate. The crate contained the twenty-eight pieces of freight. The freight consisted of fifteen large wooden chassis containing speakers, six wood frame chasis with a fiberglass coating, two musical instrument cases, and five metal trunks. A U.S. Customs Supervisory Inspector advised the agents that the shipment was still in U.S. Customs bond. The freight was removed from the Pan Am crate and placed in a TWA and United Airlines storage area.

Later that day, DEA agents opened a side panel to one of the large speaker chassis. They found a fiberglass container secreted in the compartment of the speaker. Inside the container, they found individual packages containing hashish. The speakers were repacked and the agents waited for them to be picked up. The next day, Lickert went to D & N Delivery Corporation and picked up the shipment. The agents trailed Lickert briefly and then stopped his car and arrested him. Lickert was indicted on September 27, 1973, by a federal grand jury in Las Vegas. He was charged with violation of 21 U.S.C. § 841(a)(1).[2] On October 4, 1973, a superseding indictment was returned charging Lickert with the same offense. After a jury trial, he was found guilty.

As a result of the information supplied by Lickert and others, along with further investigation by the DEA, a second federal grand jury in Las Vegas returned a three-count indictment on December 5, 1975, naming Gonsalves and fifteen other co-defendants. Count I of the indictment alleged

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[2] 21 U.S.C. § 841.

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;
>
> . . .

ninety-three separate overt acts in furtherance of an elaborate drug conspiracy. Counts II and III relied upon an alternative theory of aiding and abetting the drug importation and possession.

The District Court was able to acquire jurisdiction only over defendants Richard Kenneth Brown, Robert David Work, and Kent Giles Snyder.[3] On February 11, 1976, the District Court granted the Government's motion to dismiss Counts II and III of the indictment pursuant to rule 48(a), Fed.R.Crim.P.[4] Thereafter, the three defendants moved to dismiss the remaining count on the ground that it impermissibly charged two separate conspiracies in violation of rule 8(a), Fed.R.Crim.P.[5] The District Court agreed and dismissed the indictment on that basis. Moreover, the court set forth specific concerns it held regarding the allegations in Count I and their complexities:

> Count I of the indictment now dismissed names 16 defendants. Ten of the defendants are citizens of other countries and not amenable to the process of this Court and, according to the Government, there is no way in which they can be compelled to appear before this Court pursuant to treaty between the United States and the countries of which they are citizens. Of the 6 defendants that are citizens of the United States,

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[3] The main conspirators, Ernest Franz Combs, James Morris, and Kenneth Graham Plinston, were not before the court. Morris and Plinston are residents of foreign countries, while Combs apparently remains a fugitive.

[4] Fed.R.Crim.P., Rule 48. Dismissal

> (a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

[5] Fed.R.Crim.P., Rule 8. Joinder of Offenses and of Defendants

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

> only 3 are before this Court, the other 3 are fugitives and the Government cannot assure the Court as to whether or not pending bench warrants will ever be served upon them. The indictment names some 14 co-conspirators who are not defendants and alleges 93 separate overt acts alleged to have taken place in the United States and many foreign countries.
>
> Rule 7(c)(1) of the Federal Rules of Criminal Procedure reads:
>
> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."
>
> The Court hopes that in representing the matter to the Grand Jury United States Attorney Lawrence Semenza will make some effort at least to comply with the requirements of Rule 7(c)(1) and, in addition, to give the Court a case that is manageable for trial. Count I of the indictment now dismissed is, to say the least, a monstrosity.

Subsequent to the dismissal of the original indictment, the grand jury returned the present two-count indictment, Cr. LV 76-89, on March 25, 1976, charging appellee Gonsalves, among others, with violations of 21 U.S.C. § 846, Conspiracy to Possess with Intent to Distribute a Controlled Substance, and 21 U.S.C. § 963, Conspiracy to Import a Controlled Substance. As this was a superseding indictment, the District Court allowed all motions and responsive pleadings filed in Cr. LV 75-198 to be filed in Cr. LV 76-39.

The jury was empaneled on September 20, 1976, and the Government and attorneys for defendants Brown, Work, and Snyder each made their opening statements. The following day, the court granted a Rule 29(a) motion for judgment of acquittal as to each of the three defendants. The order of judgment of acquittal stated simply that it was based upon the Government's trial memorandum and opening statement. The transcript, however, informs us that the trial judge was concerned with at least three related problems raised by the indictment. (1) The indictment impermissibly alleged separate multiple conspiracies as a single conspiracy. (2) Viewed as multiple conspiracies, the

District Court for the district of Nevada lacked jurisdiction to try the offenses as alleged with respect to the three defendants because of lack of contact with Nevada. (3) The indictment encompassed an "unmanageable monstrosity" of proof and events so as to interfere unduly with the effective administration of justice and to require dismissal under the "supervisory powers" of the District Court. The transcript makes clear, however, that the court rested its decision primarily on the unmanageable nature of the indictment and not on the issue of jurisdiction.[6]

The Government appealed the District Court's granting of the Rule 29(a) motion on October 1, 1976. Another panel of this court dismissed that appeal on May 4, 1977, based on the fact that jeopardy had attached. On July 11, 1977, the Government filed a petition for an out of time rehearing and a motion to recall the mandate which had previously issued. These requests were denied by the panel citing the substantial delay and the failure of the Government to present adequate justification for the delay.

On August 28, 1980, appellee Gonsalves surrendered to the United States Magistrate in Las Vegas and was released on bond. The matter was set for trial on the same two-count indictment which was the subject of the previous judgment of acquittal for defendants Brown, Work, and Snyder. Subsequently, appellee moved to dismiss the indictment for the reasons articulated by the District Court as its basis for granting the previous judgment of acquittal, *i.e.*, the allegation of multiple conspiracies on the face of the indictment, lack of jurisdiction, and unmanageability. Appeallee also filed without objection a supplemental memorandum of points and authorities which set forth for review by the District Court the signed statements of the three predominant Government witnesses. These statements, which were voluminous, purportedly supported appellee's previously stated three grounds for dismissal.

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[6] The court stated that the question was "quite apart from jurisdiction." Assuming all of the overt acts occurred in Nevada, the court reasoned, the court's inherent authority allowed it to step in "to the extent it is necessary to bring order out of chaos." *See* Excerpt of Record at 63-64.

On December 17, 1980, the District Court exercising what it labeled its "discretionary supervisory powers," dismissed the indictment. The following day the Government filed its notice of appeal. Our task is to determine whether the dismissal of the indictment was a proper exercise of supervisory power by the District Court.

II. SUPERVISORY POWER

Supervisory power first appeared as an independent basis of decision in the federal judiciary in *McNabb* v. *United States*, 318 U.S. 332, 340-47, 63 S.Ct. 608, 612-616, 87 L.Ed. 819 (1943). In *McNabb*, the Supreme Court, relying on the authority of its supervisory power over the administration of the criminal justice system, excluded relevant evidence from a federal criminal prosecution because federal police and investigators had obtained it illegally. The Court described its supervisory authority over federal courts as a basis of decision resting neither on constitutional nor on statutory grounds. Since then "supervisory power" has been used to cover a broad range of judicial actions and has been exercised by all three levels of the federal judiciary for the purposes of (1) formulating new rules of fairness of general application, (2) enforcing judicial compliance with already existing standards of fairness, and (3) avoiding a miscarriage of justice in particular cases where already existing procedures have proved inadequate. *See* Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 Geo.L.J. 1050 (1965). From the outset, notions of fair play which are more exacting than the minimum constitutional requirements of due process have been the primary moving force behind the exercise of judicial supervisory power. The doctrine is now commonly invoked to refer generally to the court's inherent power to preserve the integrity of the judicial process.

The "tainted evidence" doctrine remains perhaps the most well-known rule of law which traces its origin to the Supreme Court's supervisory power. *McNabb*, *supra*, 318 U.S. at 341, 63 S.Ct. at 613. *See United States* v. *Payner*, 447 U.S. 727, 744 100 S.Ct. 2439, 2450, 65 L.Ed.2d 468 (1980). Courts also use their supervisory power to exclude

unreliable evidence from trial. *Mesarosh* v. *United States*, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956); *Communist Party of the United States* v. *Subversive Activities Control Board*, 351 U.S. 115, 124, 76 S.Ct. 663, 667, 100 L.Ed. 1003 (1956). In addition, the supervisory power has been used to impose upon prosecutors the duty in certain cases to make available to a defendant information from their files. *Jencks* v. *United States*, 353 U.S. 657, 77 S.Ct. 1007, 1L.Ed.2d 1103 (1957).

The inherent supervisory authority of federal courts has been used to do justice in particular fact situations that do not lend themselves to rules of general application. For example, in *Grunewald* v. *United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957), the defendant refused to testify before a grand jury, invoking the fifth amendment privilege against self-incrimination. However, he later testified on the same subject-matter at his trial. Cross-examination by the prosecutor revealed the plaintiff's earlier refusal, but the Supreme Court held the permitting of such cross-examination to be reversible error. The majority held that "under the circumstances of this case" the possibility of prejudice was great enough to warrant the Court's invocation of its supervisory power. *See also Marshall* v. *United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959) (exercise of supervisory power to protect against prejudice turns on facts of each case); Note, *The Supervisory Power of the Federal Courts*, 76 Harv.L.Rev. 1656, 1659 (1963).

In recent years, the Ninth Circuit has affirmed its willingness to utilize its supervisory powers to review the dismissal of an indictment by a trial court when necessary "to protect the integrity of the judicial process." *United States* v. *Chanen*, 549 F.2d 1306, 1309 (9th Cir.), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977), quoting *United States* v. *Leibowitz*, 420 F.2d 39, 42 (2d Cir. 1969). While such dismissals have been based occasionally on constitutional grounds, *United States* v. *Basurto*, 497 F.2d 781 (9th Cir. 1974), more often we have invoked our inherent supervisory power, *United States* v. *Owen*, 580 F.2d 365 (9th Cir. 1978), *United States* v. *Samango*, 607 F.2d 877

(9th Cir. 1979). Indeed, over twenty years ago this court stated that a trial court may have legal discretion to dismiss an indictment "to do justice," even in the absence of express statutory authority. *United States* v. *Apex Distributing Co.*, 270 F.2d 747, 756 (9th Cir. 1959).[7] *See also United States* v. *De Diego*, 511 F.2d 818, 824 n. 8 (D.C. Cir. 1975). In the realization that the dismissal of an indictment by a trial court may encroach on the prosecutor's prerogatives, however, this court has further held that the trial court may not exercise such "supervisory power" unless there is "a clear basis in fact and law for doing so." *Chanen*, *supra*, 549 F.2d at 1313.

Reliance upon this court's supervisory power with respect to dismissals can be seen clearly in cases involving prosecutorial misconduct in securing indictments. In *United States* v. *Basurto*, *supra*, a panel of this court held that the defendants' right to due process was violated where they had to stand trial on an indictment which the Government knew was based in part on perjured testimony. It was stated that permitting trial on such an indictment failed to comport with the required "fastidious regard for the honor of the administration of justice." *Id.* at 787, quoting *Communist Party* v. *Subversive Activities Control Bd.*, *supra*, 351 U.S. at 124, 76 S.Ct. at 667 (1956). In a special concurrence, Judge Hufstedler accepted the result reached by the majority, but declined to rely upon a constitutional theory as the basis for the decision. Instead, she relied upon "our power to supervise the administration of criminal justice in the federal courts." *Basurto*, *supra*, 497 F.2d at 793. "An important function of our supervisory

[7] *United States* v. *Apex Distributing Co.*, *supra*, involved a Government refusal to comply with subpoenas duces tecum and court orders requiring it to produce certain materials before a criminal trial. The District Court responded by ordering a dismissal with prejudice. On review, the appellate panel agreed that the United States had essentially caused an "unnecessary delay" in bringing appellees to trial. Accordingly, the circuit court held that the trial court could have properly invoked its power to dismiss under rule 48(b), Federal Rules of Criminal Procedure. *Alternatively*, the trial court "may simply have purported to act in the exercise of its inherent power to do justice." 270 F.2d at 755-56.

power is to guarantee that federal prosecutors act with due regard for the integrity of the administration of justice." *Id.*

Subsequent to Judge Hufstedler's concurrence, this court has supported the reasoning set forth therein in a number of cases involving prosecutorial misconduct. In *United States* v. *Owen*, 580 F.2d 365, 367 (9th Cir. 1978), for example, we explicitly held that, pursuant to its inherent supervisory power, a federal court is empowered to dismiss an indictment on the basis of governmental misconduct. "As such, dismissal is used as a prophylactic tool for discouraging future deliberate governmental impropriety of a similar nature." *Id.*, citing *Elkins* v. *United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960) and *United States* v. *Houghton*, 554 F.2d 1219, 1224 (1st Cir. 1977), *cert. denied*, 434 U.S. 851, 98 S.Ct. 164, 54 L.Ed.2d 120 (1977).

In this case, however, prosecutorial misconduct cannot form the basis for upholding the District Court's dismissal. Although the motives of the United States Attorney have been questioned by the trial judge in this case,[8] no allegation of prosecutorial misconduct as such has been presented.[9] Rather, the District Court focused on the sheer

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[8] *See, e.g.*, Excerpt of Record at 54-55, 57, 61, 70.

[9] Moreover, we recognize that, although dismissal is a permissible exercise of a court's supervisory power in cases involving prosecutorial misconduct, this power is more often discussed than invoked. *See Samango*, 607 F.2d at 881; *Owen*, 580 F.2d at 367. Of the cases cited in *Chanen* in which prosecutorial conduct was allegedly inimical to the integrity of the judicial process, dismissal was warranted only in those in which the prosecutorial conduct was patently egregious. *Chanen*, 549 F.2d at 1309-12. *See, e.g., United States* v. *Estepa*, 471 F.2d 1132 (2d Cir.1972); *Laughlin* v. *United States*, 385 F.2d 287 (D.C.Cir.1967), *cert. denied*, 390 U.S. 1003, 88 S.Ct. 1245, 20 L.Ed.2d 103 (1968); *United States* v. *Wells*, 163 F. 313 (D.Idaho 1908); *United States* v. *DeMarco*, 401 F.Supp. 505 (C.D.Cal.1975), *aff'd*, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827, 98 S.Ct. 105, 54 L.Ed.2d 85 (1977); *United States* v. *Gallo*, 394 F.Supp. 310 (D.Conn. 1975). *See also United States* v. *Rasheed*, 663 F.2d 843, 853 (9th Cir.1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1031, 71 L.Ed.2d 315 (1982).

unmanageable complexity of the indictment in invoking its supervisory powers.

As we discussed above, however, the inherent supervisory power of the federal courts may be invoked to do justice in particular fact situations. *See United States* v. *Samango*, *supra*, 607 F.2d at 884; Note, *The Supervisory Power of the Federal Courts*, *supra*. But the decision of whether to exercise the court's power in a particular case obviously must be made on a principled basis. For example, in *Chanen* it was noted that, even absent prosecutorial misconduct, a district court has a discretionary power to dismiss an indictment under limited circumstances where the court determines that dismissal is necessary to ensure fundamental fairness. Although in this case we review an exercise of supervisory power based on institutional concerns, *Chanen's* analysis is instructive. Before determining that dismissal was not warranted in that case, the court analyzed the dynamics of the constitutional scheme of separation of powers and the role of judicial supervisory power. The opinion explained that the court and the prosecutor play limited, but supportive and complimentary roles vis-a-vis indictments. After delineating the respective roles of the court and the prosecutor,[10] the court then described the

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[10] As a practical matter, the grand jury generally relies on the prosecutor to determine what witnesses to call. Also, in practice the prosecutor conducts the examination of the witnesses and otherwise determines what evidence to present before the grand jury. [citations] In addition, it is the prosecutor who normally prepares the indictment, [citation] although of course the grand jury must review the indictment and adopt it as its own. [citation] Some of these functions—such as initiating a criminal case by presenting evidence before the grand jury—qualifies as "an executive function within the exclusive prerogative of the Attorney General." [citations]

The court, on the other hand, exercises its power to summon witnesses to attend and to give testimony before the grand jury. Also, "it is the court which must compel a witness to testify if, after appearing, he refuses to do so." [citation] In addition, the court exercises a form of authority over the grand jury when, for example, it dismisses an indictment for failure to charge all elements of the offense or to warn the defendant fairly of the charge against which he must defend. [citation] Likewise, the court exercises authority over the prosecutor when it dismisses an indictment because of prosecutorial misconduct.

United States v. *Chanen*, *supra*, 549 F.2d at 1312-13.

standard upon which the courts should rely in exercising their inherent supervisory power:

> [G]iven the constitutionally-based independence of each of the three actors—court, prosecutor and grand jury—we believe a court may not exercise its "supervisory power" in a way which encroaches on the prerogatives of the other two unless there is a clear basis in fact and law for doing so. If the district courts were not required to meet such a standard, their "supervisory power" could readily prove subversive of the doctrine of separation of powers.

Chanen, supra, 549 F.2d 1313 (citation omitted).

We feel similarly compelled to perform a detailed analysis of the source and scope of a trial court's supervisory power before making the determination whether the power was properly invoked in the instant case.

As the Chanen court suggested, the *source* of the supervisory power doctrine in its present form is found in the complementary principles of separation of powers and checks and balances. The principle of separation requires that the judiciary, executive, and legislature be independent. The principle of balance requires that the three branches pursue inconsistent and conflicting goals. As Professor Nagel has explained:

> Separation of powers relies on the implementation of an "intellectual distinction" among the three major functions of government to . . . [prevent tyrannical use of power]; accordingly the relevant case law is replete with assertions that the branches of government must be kept distinct and each must not interfere with the functioning of the others. In contrast, the doctrine of checks and balances buttresses the conceptual distinctions among the functions of government by providing for direct intervention by each branch into the functioning of the others; power can be checked only if it is shared . . . For historical, pragmatic and conceptual reasons, American scholars have tended to favor a theory of constitutional balance over the theory of separation of powers.

Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 Stan.L. Rev. 661, 682 (1978).

The authority for a court's exercise of its supervisory power, therefore, can be traced to the structural balance articulated in Article III of the United States Constitution. *See* Note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 Stan.L.Rev. 427, 443 (1982). It is clear that Article III authorizes the judicial branch to review the operations of the executive and legislative branches. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). Indeed, inter-branch review is a necessary function within the principle of checks and balances.

> The principle of "checks and balances" embodies the notion that power can be checked only if it is shared; each branch has the right, if not the affirmative duty, to curb the excesses of the others. Therefore, the supervisory power emanates from the exercise of concurrent powers by the legislature, the executive, and the courts.

34 Stan.L.Rev. at 443-44.

The judiciary therefore should use its supervisory power to maintain its own institutional integrity, including the ability to administer an effective criminal justice system, as well as to maintain the institutional power of all three branches of government. The courts must not abdicate their responsibility to check the governmental excesses of the executive and the legislature;[11] the invocation of supervisory power may occasionally provide the necessary restraint of these excesses.

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[11] As Professor Abraham Goldstein has perceptively noted, courts often mistakenly interpret the separation of powers to preclude *any* judicial role in prosecutorial discretion.

> [Judicial passivity] . . . is rooted in a misunderstanding of the relation between the concept of discretion itself and the separation of powers. The absence of a clear-cut legal rule defined by the legislature is treated by the court allows the prosecutor not only with discretion to fill the interstices in the rule but with an exclusively "executive" authority to do so.

A. Goldstein, The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea 57 (1981).

This analysis also provides us with a means of determining the proper *scope* of the court's exercise of supervisory power in this case. When a court determines that institutional interests relating to judicial economy and the manageability of cases are threatened by pursuit of a particular indictment, it is appropriate to balance those interests with those of the executive in preservation of prosecutorial discretion, and to weigh the relative intrusiveness of action by each branch on the other's inherent functions. Specifically, we must determine whether the District Court's exercise of supervisory authority in this case unduly intruded into the domain of the executive branch, or, alternatively, whether the proposed actions of the prosecutor would have unduly disrupted the District Court's administration of justice. Following *Chanen*, we inquire whether the balance struck by the District Court between the conflicting interests of the two branches has a clear basis on the facts of this case and under the relevant legal precedent. We proceed with this endeavor in light of the District Court's order of dismissal.

The trial court's order of dismissal stated in part:

> . . . .
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> For purposes of deciding the pending motion, this Court need not decide if collateral estoppel bars the Government from bringing this indictment against Gonsalves. After all, different defendants were involved in the *Brown* [359 U.S. 41, 79 S.Ct. 539, 3 L.Ed.2d 609 (1959)] decision. Thus, this Court did not necessarily determine that it would refuse to exercise jurisdiction over any of the other defendants.
>
> This Court is well aware that a conspiracy prosecution may be brought in any district in which any act in furtherance of the conspiracy was committed by any of the conspirators, even though some of them were never physically present there. *Title 18, U.S.C., § 3237(a);* Wright, *Federal Practice and Procedure:* Criminal § 303, pp. 589-90. And, the actions in Las Vegas of Ernest Franz Combs, Jr., an indicted coconspirator, and Gary Lynn Lickert, an unindicted coconspirator, could be used to establish the necessary overt act within this district. However, the problem in *Brown* was that the indictment was such a complex

> monstrosity that this Court decided it should have been broken down into several smaller, more manageable indictments. There simply was no good reason for those defendants to be indicted in this district given their alleged roles in the Government's conspiracy theory. This Court is confronted with the same problem with the indictment against Gonsalves.
>
> Therefore, for the same reasons articulated in this Court's September 21, 1976, order and judgment of acquittal as to defendants Brown, Work and Snyder, this Court hereby exercises its discretionary supervisory powers and dismisses the indictment as against defendant Gonsalves.

Thus, the main ground given by the District Court judge for dismissing the indictment in this case was that it was "such a complex monstrosity" as to be unmanageable. The transcript of the hearing in which the order of judgment of acquittal was entered on behalf of Brown, Work, and Snyder reflects vividly the fact that the trial judge had had previous experience with massive conspiracy trials which broke down because of their size. Of course, this problem—of the Government attempting to force as many defendants as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies—is one which is not faced by judges in this circuit alone. In the Second Circuit, for example, one panel found it necessary to issue the following warning to the United States Attorney's Office:

> In view of the frequency with which the single conspiracy vs. multiple conspiracies claim is being raised on appeals before this court, see *United States* v. *Rizzo*, 491 F.2d 12345 (2 Cir.1974); *United States* v. *De Marco*, 488 F.2d 828 (2 Cir. 1973); *United States* v. *Mapp*, 476 F.2d 67 (2 Cir.1973), we take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen

> or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government's having prosecuted the offenses here involved in one rather than two conspiracy trials. On the contrary, many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself. We have already alluded to our problems at the appellate level, where we have had to comb through a voluminous record to give adequate consideration to the claims of eleven separate appellants.

United States v. *Sperling*, 506 F.2d 1323, 1340-41 (2d Cir.1974), *cert. denied*, 420 U.S. 962, 95 S.Ct. 1351, 43 L.Ed.2d 439 (1975) (footnotes omitted). When the Government failed to heed the admonition, the court did in fact rely on *Sperling in reversing the convictions of seven defendants convicted of conspiracy to violate the federal narcotics laws. United States* v. *Bertolotti*, 529 F.2d 149, 151 (2d Cir.1975).

The District Court in this case had an ample factual and legal basis upon which to conclude that the indictment pursued by the prosecutor constituted a serious intrusion into the judiciary's interest in the fair administration of the criminal justice system. *See Payner, supra*, 447 U.S. at 735 n. 7, 100 S.Ct. at 2446 n. 7; *McNabb, supra*, 318 U.S. at 340, 63 S.Ct. at 612. Faced with the same complex indictment, and with the benefit of lengthy trial briefs, the opening statements of counsel, and the volumes of Government witness statements, the trial judge entertained the same serious concerns about the sheer impossibility of a manageable, fair trial that he expressed earlier in connection with Brown, Work, and Snyder. Our own review of the record, and indeed our mere recitation of the elaborate facts of the conspiracy outlined in the indictment, *see* Part I *supra*, show that the facts here justified the conclusion that to allow prosecution on this indictment would 'gravely impair the basic function of' the District Court.

The court was not required to ignore the practical considerations attendant to a trial of this size and complexity, *e.g.*, the innumerable pretrial motions, the occupation of weeks of the court's busy calendar, the superhuman tasks facing the jury,[12] and the likelihood of a mistrial. On the facts of this case the judge had a solid basis upon which to find the prospect of these horrors real and the resulting disruption of the judicial process great.

In contrast, the degree of encroachment upon the prerogatives of the prosecutor that a dismissal entails in this case is minimal. Although the court's order is not entirely explicit, it is clear that the indictment was dismissed without prejudice. The order suggested that the indictment be broken down into smaller, more manageable indictments, thus leaving the prosecutor free to reindict Gonsalves, and the other alleged conspirators, in a manner less intrusive upon the administration of a fair criminal justice system in the courts.[13]

The Government argues that a court never has the right to dismiss an indictment on the grounds of unmanageability, even if the dismissal is without prejudice. In support of this claim, it cites *United States* v. *Olson*, 504 F.2d 1222 (9th Cir.1974).[14] The trial judge in *Olson* had ob-

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[12] As reflected in the transcript, one of the court's major concerns was the "dragnet effect" of complex conspiracy cases and the ability of a jury to digest and comprehend the evidence relevant to the defendant. *See* Excerpt of Record at 62-63.

[13] The District Court recognized that when broken down into smaller conspiracies, indictment against some of the defendants may not result in proper venue in the Nevada District Court. *See* Excerpt of Record at 383-84 (Order dismissing the indictment against Gonsalves).

[14] The Government cites other cases which it claims support its argument that the District Court's exercise of supervisory power in this case was improper: *United States* v. *Wilson*, 614 F.2d 1224 (9th Cir.1980), *United States* v. *Welch*, 572 F.2d 1359 (9th Cir.), *cert. denied*, 439 U.S. 842, 99 S. Ct. 133, 58 L.Ed.2d 140 (1978); *United States* v. *Hall*, 559 F.2d 1160 (9th Cir.1977), *cert. denied*, 435 U.S. 942, 98 S.Ct. 1523, 55 L.Ed.2d 539 (1978). *Olson*, however, while not controlling, is clearly the most relevant to the instant case. It is the only case cited by the Government that addresses the issue of the United States Attorney presenting unmanageable and overly-burdensome indictments to the courts.

served that the United States Attorney in his district consistently presented to the grand jury overly lengthy indictments which served to burden the court with extended jury trials and complex jury instructions. The judge's solution was to attempt to force the prosecutor to pare down the indictment before trial to conform to the judge's desires.

Hall involved a defendant who had already served a one-year term for smuggling which had been granted on the condition that he "consent" to the entry of a civil decree of forfeiture of the merchandise. Defendant appealed and secured a dismissal of the indictment after which he was reindicted for the same offense. The District Court dismissed the indictment on the ground that it would be "unconscionable to proceed further" and retry the defendant. The appellate panel held, *inter alia*, that "unconscionability" was not a proper basis for the District Court's exercise of its inherent supervisory power since there was Ninth Circuit authority to the effect that "merciful inclinations" were not a sufficient basis for substituting judicial discretion for prosecutorial discretion in dismissing an indictment. *See United States* v. Real, 446 F.2d 40 (9th Cir.1971). Moreover, the court noted that the Supreme Court had approved of reindictment and retrial under circumstances analogous to the case before it in *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). The case at bar, on the other hand, does not involve any issue of "unconscionability" or "merciful inclinations." Moreover, unlike the situation in *Hall*, there is no controlling authority on the issue of "unmanageability." Finally, in *Hall* and *Real* the trial court sought to prevent the indictment of the defendant; the trial court in the instant case simply refused to allow the prosecution of Gonsalves pursuant to *this* indictment.

In *Welch*, the defendant was convicted in federal district court of unlawfully transporting a firearm in interstate commerce and possession of a sawed-off shotgun. He appealed on the ground that it was against Justice Department internal policy to try him in federal court for the same act on which he had already been indicted (later dismissed) in state court. The appellate court affirmed the conviction, relying on a prior Ninth Circuit case which had held that a federal court has no authority to determine whether a federal prosecution violates an in-house policy of the Attorney General.

Wilson also involved a defendant who challenged her conviction on the ground that the United States Attorney's Office contravened its own guidelines, in this case by serving a forthwith subpoena on her only two hours before she was to appear before a grand jury. The court of appeals, relying in part on *Welch*, held that the guidelines in the United States Attorney's Manual do not have the force of law. Moreover, on a practical level the court held that the use of the forthwith subpoena under the facts before it was not an abuse of discretion. *Welch* and *Wilson* obviously provide no authority for the resolution of the issues presented in this case.

When the Government refused to elect one out of the four counts on which to proceed to trial, the District Court dismissed the entire indictment with prejudice.

Olson is distinguishable in that the District Court's rationale for its order of dismissal was solely that it was "highly improbable" that the court would impose consecutive sentences and that a conviction on all four counts was therefore unnecessary. The Government refused to elect on the grounds that (1) there was no showing that the joinder of the four counts and their simultaneous trial would prejudice either defendant or the Government, and (2) the election of the conspiracy count would not shorten the trial because the principal evidence to be produced—tape recorded conversations of the defendant and an informant—would also support the three remaining substantive counts. The prosecution claimed it would be impossible to play the tape recordings without the jury hearing information which would support all four counts.

Olson therefore does not support the proposition that a trial judge may never dismiss an indictment on the basis of unmanageability. Rather, *Olson* stands for the proposition that a dismissal with prejudice is not an appropriate exercise of a court's supervisory power when a prosecutor fails to heed the court's "suggestion" that all but one of a number of counts of an indisputably valid indictment be dropped. No practical or legal grounds supported the summary dismissal in that case; indeed, such drastic action by the District Court on the basis of such facile reasoning intruded unduly on the historic role of the prosecutor. *Olson*, therefore, and other cases on which the Government relies, are distinguishable on the basis that a complete termination of the criminal prosecution, *i.e.*, a dismissal with prejudice, entails an undue intrusion into prosecutorial prerogatives. *See, e.g., United States* v. *Hall*, 559 F.2d 1160, 1165 (9th Cir.1977), *cert. denied*, 435 U.S. 942, 98 S.Ct. 1523, 55 L.Ed.2d 539 (1978) (district court judge has no power to dismiss indictment on ground "it would be unconscionable to proceed further"); *United States* v. *Real*, 446 F.2d 40 (9th Cir.1971) (district court judge improperly dismissed indictment on ground of "merciful inclinations" toward de-

fendant).[15] Such dismissals may easily constitute an example of the improper substitution of judicial discretion for prosecutorial discretion. It remains the prerogative and responsibility of the executive to determine whether to prosecute at all. In contrast, the district judge in this case left the Government free to reindict the defendant, either in the same district pursuant to a more manageable indictment, or in another district, should a new indictment reveal a lack of jurisdiction over this particular defendant.

We conclude, therefore, that the intrusiveness of this cumbersome indictment on the judicial machinery is so great, while that on prosecutorial discretion so slight, that the district court did not abuse its discretion in using its inherent supervisory powers to dismiss the indictment.

AFFIRMED.

[15] *See* note 14, *supra*.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Crim. LV 76-39 RDF
Received and Filed: Dec. 17, 1980

UNITED STATES OF AMERICA, PLAINTIFF

v.

STEPHEN ANTHONY GONSALVES, ET AL. DEFENDANTS.

ORDER GRANTING MOTION TO DISMISS INDICTMENT ON BEHALF OF DEFENDANT GONSALVES

The defendant Stephen Anthony Gonsalves has been charged by a two-count indictment. Count I charges a conspiracy to import a controlled substance, and Count II charges a conspiracy to possess with intent to distribute a controlled substance. Both counts allege that on or about May 25, 1973, the defendant delivered to Harold Adrian Armstrong in Long Beach, California, approximately $140,000 in cash. The cash ostensibly was used to purchase controlled substances as part of an international conspiracy to smuggle controlled substances.

Defendant has moved this Court for an order dismissing the indictment for three separate, but related, grounds (1) each count of the indictment impermissibly charges separate multiple and distinct conspiracies as a single conspiracy, (2) this Court lacks jurisdiction to try the offenses as alleged against Gonsalves, and (3) the indictment unduly interferes with the effective administration of justice so as to require dismissal under this Court's inherent supervisory powers. He claims that collateral estoppel requires dismissal of the indictment.

The indictment against Gonsalves is the very same indictment that was at issue in this Court's previous decision in *United States* v. *Brown*, et al., Cr. LV 76-39 RDF (Sep-

tember 21, 1976). In that previous decision, this Court entered an order and judgment of acquittal pursuant to Rule 29(a), FRCrP, as to Brown, Work and Snyder, the only three defendants who were before the Court at that time. The decision not to exercise jurisdiction was based upon the Government's trial memorandum and opening statement in light of the monstrous complexity of the case. The same three grounds of dismissal relied upon for that decision are now asserted by Gonsalves for dismissal of the indictment as against him. The Government's opposition to his motion merely argues that the indictment does properly charge a general conspiracy in each count. The Government has not addressed the issue of whether or not this Court has the inherent supervisory power to decline jurisdiction.

The doctrine of collateral estoppel is applicable to criminal cases. *Ashe* v. *Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); *Sealfon* v. *United States*, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948). Two criteria must be met before criminal collateral estoppel may be applied. First, the party estopped from relitigating an issue must have been a party to the initial litigation. *United States* v. *Smith*, 446 F.2d 200 (4th Cir. 1971); *Serio* v. *United States*, 203 F.2d 576 (5th Cir. 1953). Second, a defendant claiming an estoppel must show that the issue he seeks to exclude from the subsequent trial was "necessarily determined" by the former verdict of acquittal. *United States* v. *Smith*, supra; *United States* v. *Friedland*, 391 F.2d 378 (2nd Cir. 1968); *Adams* v. *United States*, 287 F.2d 701 (5th Cir. 1961). Since collateral estoppel applies only to matters actually litigated, the moving party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated. *United States* v. *Lasky*, 600 F.2d 765, 769 (9th Cir. 1979).

For purposes of deciding the pending motion, this Court need not decide if collateral estoppel bars the Government from bringing this indictment against Gonsalves. After all, different defendants were involved in the *Brown* decision. Thus, this Court did not necessarily determine that it would refuse to exercise jurisdiction over any of the other defendants.

This Court is well aware that a conspiracy prosecution may be brought in any district in which any act in furtherance of the conspiracy was committed by any of the conspirators, even though some of them were never physically present there. *Title 18, U.S.C. § 3237(a);* Wright, *Federal Practice and Procedure:* Criminal § 303, pp. 589-90. And, the actions in Las Vegas of Ernst Franz Combs, Jr., an indicted coconspirator, and Gary Lynn Lickert, an unindicted coconspirator, could be used to establish the necessary overt act within this district. However, the problem in *Brown* was that the indictment was such a complex monstrosity that this Court decided it should have been broken down into several smaller, more manageable indictments. There simply was no good reason for those defendants to be indicted in this district given their alleged roles in the Government's conspiracy theory. This Court is confronted with the same problem with the indictment against Gonsalves.

Therefore, for the same reasons articulated in this Court's September 21, 1976, order and judgment of acquittal as to defendants Brown, Work and Synder, this Court hereby exercises its discretionary supervisory powers and dismisses the indictment as against defendant Gonsalves.

/s/ Roger D. Foley
ROGER D. FOLEY
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Criminal LV-76-39, RDF

UNITED STATES OF AMERICA, PLAINTIFF,

v.

RICHARD KENNETH BROWN, ET AL., DEFENDANTS.

Before:
The Honorable Roger D. Foley, District Judge

REPORTER'S TRANSCRIPT OF COUNSELS' OPENING STATEMENTS AND THE COURT'S ORDER OF ACQUITTAL.

Monday, September 20, 1976
Tuesday, September 21, 1976

WILLIAM E. MADARA, R.P.R., C.S.R. #22, Court Reporter Pro Tem

APPEARANCES:

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* * * * *

[pages 28-48]

LAS VEGAS, NEVADA, TUESDAY, SEPTEMBER 21, 1976 ,

THE COURT: The record will show the presence of the defendants and their counsel and the Assistant U.S. Attorney.

Last night there was introduced a writ hearing in this case and I didn't recognize it as such until I got it in chambers. Applying the principle of *Briggs* that it is improper for the government to name persons as unindicted co-conspirators, that has absolutely nothing to do with the admissibility of evidence. Let's assume that you have a conspiracy with only two named co-conspirators and the evidence shows that there were four others. Under proper circumstances, if a conspiracy is shown to exist, if the defendant is shown to be a member, then the third party's act or declaration of a co-conspirator is admissible in accordance with the rules of evidence. I think the government brief is right and defense counsel saw that from the start and wondered what I was talking about. In any event, that is no longer a problem.

As a matter of fact, I sighted [sic] to you a second case from the Fifth Circuit *Beasley*. In that case, counsel was trying to turn this rule around as defense counsel often does, the court said, this is another panel, "In reality he attacks the government's failure to specifically name Dickey Diamond and Barbara Irwin in the indictment. Both were admitted co-conspirators and the prosecution's key witness in the conspiracy count." Then, in a footnote, the court says, "We note this Court's recent decision in *Briggs*," and so forth, So that is no problem.

However, I had planned to dispose of this case this morning, but in his anxiety Mr. Sherman has obtained an order from the august Walter Ely and Shirley Hufstedler from the Ninth Circuit which says that I cannot go further. It says, "Further proceedings in District Court are stayed pending compliance with these directions." That is hearing the late motions you filed.

I would interpret that to mean that I can't go ahead with the trial. Suppose I wanted to grant a motion for a directed verdict on the opening statements and the trial brief of the government, which I think I'm going to do. Would I then be in contempt of my superiors, Mr. Sherman?

MR. SHERMAN: May I address the court on that subject, sir?

Your Honor, I did not mean, just to make myself clear, I think sometimes it is necessary—Judge Foley, I have really and truly great respect for this court. I meant no impertinence with that petition and it was not the sole effort on my—

THE COURT: Judge Ely and Judge Hufstedler are not adverse to intruding into the area of the District Court's work before appeal. That doesn't surprise me. You got the right judges among others that would have listened to you.

MR. SHERMAN: Your Honor, if I could have brought that writ to a San Francisco Judge and been here and there at the same time, I assure Your Honor that I would have done exactly—

THE COURT: Well, I don't want to get into that.

I'm going to take the position that what Judge Ely and Judge Hufstedler mean when they say, "Further proceedings are stayed pending compliance . . .", that means, "Judge Foley, you can't go ahead with the trial."

So, I feel that if I go ahead and consider what I think I am going to do—I read that trial memorandum last night, I hadn't read it before, I scanned it—if I am going to dismiss this case, I assume that my superiors are not going to find me in contempt of their order.

MR. SHERMAN: I would assume so, Your Honor.

THE COURT: In fact, you would be pleased with dismissal?

MR. SHERMAN: Your Honor, I would be delighted.

THE COURT: So, let's lay this aside.

Now, in the Alice in Wonderland mind of Lawrence Semenza, who is the United States Attorney for Nevada, we have conjured up here a massive conspiracy. This isn't the first time Mr. Semenza, in his own inimitable way, has conjured up a massive conspiracy. Back in 1974, I spent a whole summer, missed the Judicial Conference, trying one of Larry Semeza's dreams and it finally broke down because of its sheer size. We had thirteen defendants, fifteen lawyers. We had a conspiracy that involved a Mexican who was the source of marijuana in Mexico. We had defendants and multiple and unindicted co-conspirators who had to do with loading cars in Mexico and driving across the border. Couriers who took them from El Centro to Las Vegas, couriers who took them from Las Vegas to Salt Lake, couriers who took them to Detroit. And then there, five or six other defendants who bought the stuff and distributed it in the Detroit area. It was a dandy.

We finally ended up negotiating pleas. It was impossible to try. Fifteen lawyers cross-examining each government witness.

The Detroit lawyers, I think most of them had never been out of the Police Courts before, they were the most discourteous bunch of lawyers I ever met in my life. They tried me constantly. They were able to get to my Irish and I apologized and wrote speeches to the jury every other day trying to unring the bell. We went on and on and Mr. Semenza sat in that chair and smiled. I think he likes to concoct this type of monstrosity.

Now, I said something about that when I threw out the first indictment in this case. So, this isn't the first time.

Now, I am going to grant, if defense counsel will move, a motion for judgment of acquittal based upon the government's opening statement and trial memorandum. I assume that defense counsel will so move?

MR. SHERIDAN: So move, Your Honor.

MR. SHERMAN: So move.

MR. KIEMERER: So move, Your Honor.

THE COURT: Now, let's look at this thing. You turn to page two of the government's trial memorandum—first let me say that poor Mr. Pro and poor Mr. Lufty have struggled long and hard with this case. I know you put a lot of time and preparation in this case. It is not your fault, it is your bosses' fault. First transactions, in February of 1973, Mr. Gater met with Combs in Lake Tahoe in California, that puts us in the Eastern district, is that right?

MR. SHERIDAN: It is, Your Honor.

THE COURT: And then after that, Gater came into Los Angeles pursuant to arrangement agreeing to pick up marijuana. He went to Rick Brown's house, one of the defendants here, in Newport. Well, no, he was to proceed from Lake Tahoe to Rick Brown's house. Then, he flew into Orange County Airport and Brown picked him up and took him to a warehouse in San Pedro. Brown told Gater this is where the load was to be delivered.

They drove to Brown's home in Newport Beach. Brown showed Gater a Carnet and told him that he would have to show it to get the air cargo from TWA in Los Angeles International in order to pick up the shipment of musical equipment. Then, ultimately Gater picked it up, drove the truck to the warehouse in San Pedro, Brown was waiting for him. Bob Work, another defendant on trial here, came in the picture there and he told Gater that he had made the shipping arrangements for the speakers from Paris. Gater, Brown and Work unloaded the speakers and put them in the warehouse. They took this red Lebanese hashish and put it in small packages and so forth.

Then, Mr. Gater for his trouble, got a kilo of hashish. That's it. That is one complete conspiracy.

Most prosecutors, ninety-nine out of a hundred lawyers that have any logic in their mind, would have said, "Okay, that is one charge.", return an indictment against Gater. Gater is going to be a witness against Brown and Work in the Southern district of California, that is the proper venue. That is just the beginning of Mr. Semenza's dream.

I would really wish the press were here, perhaps that is just as well.

In March of 1973, this is transaction number two, back up at Lake Tahoe Combs is there and he wants to know if Gater wants to go to Europe to take part in a shipment from Europe. Gater said, "Yes.", and Gater is to rent a house in Austria and there he is to collect the hash. Gater is going to get a piece of the action this time. He is going to invest twenty thousand dollars. And Bob Frye, a defendant here, who is in the United States, but has never been found, at least he is a United States citizen, he played a part in this caper. Bob Frye is to go to Austria to assist Gater. And then, Sam, I will call him Sam, it is Mr. Hraouri, who is a named defendant, he is to meet him there in the Hotel Steierhof, and he does.

Before he goes, he seeks Rick Brown and Rick Brown helps him put the money together and Combs comes in with some money and they have a total of three hundred thousand dollars. Then, Linda Sibson assists in changing this into small bills apparently, one hundred dollar bills, and then, off with the money in his boots and in his suitcase goes Mr. Gater to Austria. He calls Brown and he says everything is all right.

Now, there is nothing further in this caper to do with Brown or with Work. Nothing to do with Work at all. There is a dealing with Krug, who is a defendant, as I say, there was a dealing with Frye, Klaus Warner who is a defendant, none of whom are before the court, or Mayo, a defendant—these are unindicted co-conspirators.

In any event, this caper begins in March of '73 and it is described on pages three, four and five of the government's massive trial brief. You have to have a massive trial brief when you have a mass of [sic] indictments. Finally, in May, March until May—wait a minute, I left out something—Snyder comes into the picture here. Gater receives word from Gonsalves, who is also a defendant, that Snyder is coming over and that Combs has sent Snyder over to pick up the money. So Gater meets Snyder in Vienna. Snyder is involved in the rest of this and finally, Snyder and Gater fly back to the United States. They go to Rick Brown's house. *So, he is tangentially involved, but Work is not involved in*

this at all. And this time, Gater gets twenty-five thousand dollars.

Another complete transaction. Another conspiracy. Another time. The months from March '73 through May of '73.

Now, transaction number three. In June of '73, arrangements are made between Sam who is now in Lake Tahoe and Gater, Carl Krug, and Combs calls for Gater to go back to Europe again. This caper involved other people, Jim Morris, Gay Rober, co-conspirators, counsel has read it. Finally,—I don't think there is anything in here—there isn't anything in here that touches any of these defendants. I don't think the government lists any of them here. Mayo is involved and Klaus is involved.

Finally, Gary Lickert gets busted in Las Vegas and that is the trial we have. Work gets out and doesn't come back.

Now, wait a minute, I am getting ahead of myself. Well, this transaction, let me see, goes on, it begins on top of page six of the trial memorandum and goes on to page seven and page eight. That's right. I was right. In September Gater gets word that a load of hash has been busted in Las Vegas and apparently he had some conversation with Rick Brown. So, I guess Brown is to some extent at least, minimally involved in that transaction. But, any way, that is another complete transaction.

Now, in an effort to give this court a jurisdiction, we have a replay of the Lickert case, a complete replay. Chapter and verse. And there is absolutely nothing in the transaction in Las Vegas on Gary Lickert where he was convicted. This begins, according to the government's trial brief, on page eight in August of '73 and ends in September of '73. This is discussed on pages eight, nine, ten, eleven, twelve and thirteen, down to the middle of page fourteen. That is all nothing more than a replay of the Lickert case and Brown, Work and Snyder has nothing to do with the Lickert matter in Las Vegas. So, the only claim of jurisdiction, the only possible claim of jurisdiction or venue, we're talking venue, the only crime that was committed in Nevada was the crime that Lickert already stands convicted of and the defendants have *nothing to do with it.*

The theory, of course, in this mind of Mr. Semenza's, "Yes, that they are working for Combs." Well, Combs might have hundred and fifty other people working for him importing, I don't know, it could be a half dozen other things not only involving controlled substances. Maybe he is a fence for stolen diamonds from South Africa, maybe he is engaged in the disposition of antiques in Russia. I don't know. But, if you follow the logic, the illogic of the mind of our United States Attorney, that is all one great conspiracy. It is ridiculous. It is absolutely ridiculous. As I said, I fell for it once. I fell for it once. Damn near had a nervous breakdown with that trial. It should have taken two or three weeks and I let one Los Angeles lawyer voir dire the jury and three days later, we are still trying to get a jury. I remember that very well.

Now, finally after this sixth transaction—now there are really two Lickert transactions, one involving flying to Europe and the other one involving this Las Vegas transaction. I have got these marked and I have seven transactions.

The seventh one involves Harold Armstrong, and that I didn't look at too carefully last night, I was too upset by that time. But, I am satisfied that it doesn't have anything to do with any of these defendants.

And Mr. Sheridan mentioned, he said, "I wish Your Honor would give thought to jurisdiction." And I hadn't read the trial briefs carefully. I haven't done any research, but I am going to grant the motion based on the, and it is so ordered that it is granted, based on the opening statements and the trial brief, on the grounds that the court had no jurisdiction. And on the further ground that this type of a monstrosity, unmanagable monstrosity, does not have to be tried by Federal Judges. The United States Attorney in any district, I suppose gets whatever indictment he wants out of the Grand Jury, that is the system. I wouldn't listen to Mr. Sheridan yesterday and I told him to read *Costello* and he knows Costello as well as I do. One agent can go in and tell heresay [sic] stories if the Grand Jury wants to indict, that's it. It's going to change, it's going to have to. Mr. Sheridan is an oldtime prosecutor, one of the best they have in Los Angeles and one of the finest criminal lawyers they have in the coun-

try, I think, he knows this. I guess that is what Mr. Sheridan was trying to get to, but I didn't realize what we had in this trial. But, it was Leonard [sic] Hand who talked about the dragnet affect of conspiracies and dangers and so forth and this is dangerous. I don't think the jury could digest this. I doubt that I can. I had the same problem in the other case which incidentally for the record, that case is *U.S.V. LANDT et al.* LV 74-13 indicted by the Grand Jury. And it was signed by Mr. Semenza and no one else, January 17, 1973. It was tried under the administration of DeVoe Heaton, I don't think Mr. Heaton ever saw it. I doubt that he would have allowed it to go ahead.

But, in any event, this type of conspiracy is unmanagable trial wise. I don't know if there is any case law to support me, I think that a trial Judge is not an umpire and courts have said this. A Federal trial Judge can participate to the extent it is necessary to bring order out of chaos, to the extent necessary to see that it is a fair trial and comment on the evidence and so forth. He has management powers, he is not an umpire calling all the balls and strikes as some of our poor state courts.

And when something like this comes in, the court has the inherent authority, I am going to hold, I don't know whether Mr. Semenza will probably take this up to the Circuit, then I will have to depend on Mr. Sheridan and Mr. Sherman and Mr. Kimerer to represent me, but I'm going to hold that the court has the inherent jurisdiction to dispose of this type of thing. It is quite apart from jurisdiction, I think. Let's assume that everything that happened in California happened in Nevada. Nevada was the headquarters. Even so, I still would throw this out for the various reasons. Of course, I will allow counsel to think about it and read what the government says in their brief if they do take it to appeal and then leave open any other reasons to support me. But, it is the kind of thing that should not be tried or allowed.

Now, I threw out the first indictment because I think he alleged two crimes in one count and that can't be done. But, the rules, the rules, Mr. Semenza, doesn't he read them? Wasn't there a short statement, what rule is that, Mr. Sheridan?

MR. SHERIDAN: The duplicity, it comes from a case from the Ninth Circuit.

THE COURT: Not just the duplicity, but the complexity and prolixity.

MR. SHERIDAN: Rule seven, Your Honor.

THE COURT: Rule seven.

MR. SHERIDAN: Seven A.

THE COURT: Seven A. I refer to that rule in throwing out the first indictment.

"The indictment or information shall be a plain, concise and definite written statement of the essential facts of the offense charged."

I don't expect a response from government counsel, you have got to be loyal to the man you are working for. I have great respect for Mr. Lufty and Mr. Pro, they do a great job and it is a pleasure to have them to prosecute cases of the government in front of me. As I say, Mr. Semenza threw you this case and you were stuck with it.

All right, anything that counsel wants to say?

MR. LUFTY: Yes, sir, may we be heard just briefly.

There are a number of things. First of all, Your Honor, we would respectfully ask Your Honor to allow us to present our evidence and if you are going to rule on this, do it on 29A.

THE COURT: I am not going to waste two or three weeks. I have got other things to do and so have you and the other counsel.

MR. LUFTY: I don't think that the government is necessary [sic] limited to the—

THE COURT: I never yet granted, although Judge Nellis ruled on one, moved for a judgment of acquittal or read a statement and it's shown in case law, I have never done this before. But, go ahead.

MR. LUFTY: We feel that there is certainly sufficient evidence to present at a trial. If we had included everything in the trial memorandum that we intended to offer in trial, it would have taken days to have written. But, we felt that we put enough into the memorandum to give Your Honor an idea where the case was going and where we felt the kind of

overt acts we were concerned with that we felt showed a conspiracy.

THE COURT: Well, here is what bothers me, you have got seven conspiracies here. Now, you could have seventy-seven under Mr. Semenza's rationale. Let's suppose that for twenty-five years Mr. Combs has been engaged in hiring people to engage in criminal activities of all sorts and there are all kinds of violations of Federal Law and all over the world and all over the district conceivably and in ninety-one districts of the United States. I am not being silly. You can multiply, multiply, multiply, common sense has got to come into this things someplace.

MR. LUFTY: I guess we felt it did in the sense that we made the terms of this conspiracy, the time frame from January of '73 through June of '74.

THE COURT: There is nothing wrong with the time frame. That is about a year and a half, but it is the multiple transactions.

MR. LUFTY: Looking at the cases that we have dealt with, they are separate conspiracies or one overall conspiracy, deals with the question first of all with the agreement between the parties. We don't know exactly what their agreement was, whether it was one agreement as the goverment contends, to conspire together to violate the law by a multiplicity of means. And if that is so, as the government contends it is, then that is one conspiracy, even though there may be a multiplicity of means to accomplish that. Such as the number of transactions that are involved within the instant indictment. We contend there was one agreement which we obviously admit Combs as being the head of this thing. But, nevertheless, Mr. Brown and Mr. Work and Mr. Snyder, all participated in it. They all participated perhaps in different times and with different functions within that conspiracy and as to different levels, but it is all part of that one ongoing agreement with Mr. Combs to violate the law. The fact that they have done a multiplicity of things, does not change from one conspiracy to two or three.

My understanding of the question is what was the nature of the agreement, if there is an overall agreement. And we contend that the overall agreement was to import controlled

substances into the United States and after getting it to the United States, to possess them and to distribute them and that is exactly what the defendants—

THE COURT: I think that is probably true in Combs' mind.

MR. LUFTY: And we contend on the defendants—

THE COURT: We have got seven different transactions with different people involved in most of them carrying out Comb's plans.

MR. LUFTY: That is correct.

But, Your Honor, we contend rule the plan here in the United States. We have got Jim Marks who is running transatlantic sound—

THE COURT: You are misunderstanding, I am not saying there is no theory to support the conspiracy, I understand the theory for this. I say it is a monstrosity, it is unmanageable, it is not the kind of thing that the court has to put up with and it should be broken down.

What should have happened here, if Gater is the key witness, the first transaction in February of '73 should have been indicted and returned in California and so should the second. We should have had about seven different indictments here.

Now, there is no jurisdiction, nothing that these three young men did in Nevada. They were never here. They didn't even make a phone call to Gary Lickert. You have got to tie that in. You get your astriction [sic]—what Larry Semenza did here, he attempted to get jurisdiction in Nevada by reallegeding [sic] chapter.and verse the evidence that was received in the Lickert case. Now,whoever filed the Lickert indictment didn't try to bring in Brown, Work and Snyder and all these other people. That was well done. That was an involved enough case as it was. It was very complex, took a long time to try.

MR. LUFTY: But, in our memorandum here, we have evidence that we did not have then. For instance, we are going to offer Jean Kemp who did testify in the Lickert trial, was the manager of the Park Newport Apartments who rented an apartment to two individuals who called themselves Avery Lee and Ernest Roberts, Johnathan Avery Lee who

we contend we will show was Ernest Combs and that Ernest Roberts we contend will show is defendent Work. We will get a handwriting expert who is going to come in and testify that the signature on the lease of the apartment in the Park Newport Apartments, signed by Mr. Lee and Mr. Roberts is in fact Work and Combs. And that there were calls from that apartment to D. and N. Delivery relative to the Lickert transaction. You will remember Ed Hill from D. and N. Delivery testified that he received a number of phone calls during that day about when would the delivery arrive, when it is going to clear through customs. We are going to offer evidence of the tone that the phone calls of Park Newport to show the tie-up between Mr. Work who is the tenant for that apartment and the D. and N. Delivery in this particular delivery that Lickert got busted for. That is at least one instance.

THE COURT: You are not going to offer any evidence. If the Court of Appeals reverses this finding and sends it back for trial, I won't try it. I will find some young Judge that has got more patience and more energy than I have, to come in and to try it. But, I don't think that the court has to sit carte blanche—let's suppose that somewhat like the Landt case that all the defendants were found here and they all had different lawyers. Have you ever been through one of those? Mr. Sheridan I know you better than those other gentlemen. Have you ever seen one of those tried?

MR. SHERIDAN: Yes, Your Honor.

THE COURT: They are horrible. They are unmanageable. You've got how many defendants, eleven?

MR. SHERIDAN: Thirteen, I think and seventeen unindicted co-conspirators.

THE COURT: You have got eleven cross-examiners for each witness. As I say, I went through this.

Now, I don't think that the court has to let the U.S. Attorney create these monstrosities and shove them down the court's throat and choke on them and go on and on and leave other work aside and tie-up a jury for months and do this. I know there are massive conspiracies, the Dennis case, the massive conspiracy case that the famous Judge in New York, Medina tried. There are, and I understand that, but in

this type of thing, and as I said, the same thing, the same theory as Landt...

Now, in the Landt case, all of those five defendants in Detroit who bought the stuff in Detroit and distributed it in Detroit, should have been prosecuted in Detroit. That is the way I felt it should have been looked at by the U.S. Attorney. I would have got the people that imported it, smuggled it into here and gotten that in California. But, no you see they all came from Las Vegas and that is how I got it. Another one of Mr. Semenza's Alice in Wonderland dreams. And they are that. They are ridiculous in concept. I don't know what the matter is, I don't know how he thinks. I think he has some kind of sense of delight in conjuring these things up, creating these massive puzzles and saying, "Let's see how Judge Foley can handle that." I don't know what is going on, but I will tell you this much, I'm not going to put up with it any more. Please God, we'll have a change of administration and he'll be gone. I don't know about that either, but I'm not going to put up with Semenza any more.

So, I won't try this. If the Court of Appeals should say that I am wrong, I don't think they are going to, and this case comes back, I won't try it. And I won't try any more of Larry Semenza's cases that are this ill. I'm going to have to work out some system when I get copies of the indictment where I can demand in advance a trial brief so I can see what we are into before we go through all of the time and energy, the motion stage and impanelling the jury and so forth. I had intended yesterday afternoon before I studied this trial brief, to do what you suggested, wait until the end of the government's case and let you put on your evidence. But, I'm not going to go two and three weeks for that.

MR. LUFTY: May I make just one last point, Your Honor and then I'll sit down.

The problem we faced with conspiracy trial, as with every conspiracy trial, we charged on conspiracy that is on going for an eighteen month period and defense attorneys jump up and say, "you have a multiple conspiracy." Had we charged multiple conspiracies here, if we were here with the defendants on the eight or a ten or a twelve count indictment or difference trials and different conspiracies—

THE COURT: That is what you should have done. You should have broken them down to separate indictments, the Eastern District of California and the Central District of California. You have nothing to bring here. We have already tried Lickert—you want to retry it so that you could try to tie it in here.

MR. LUFTY: We believe we could show the annexus [sic] here and we could show where they—

THE COURT: Well, I appreciate your position.

* * * * *

[page 58]

All right then, the order will be then that the Court, lacking jurisdiction and because of the reasons given in considerable detail about the complexity of this case, based upon the trial memorandum and the opening statement, the defendant's motion for a judgment of acquittal is granted.

(At 9:48 o'clock, the trial in the above entitled matter was concluded.)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-1860
DC CR LV 76-0039-13 RDF

UNITED STATES OF AMERICA, PLAINTIFF/APPELLANT,

v.

STEPHEN ANTHONY GONSALVES, DEFENDANT/APPELLEE.

APPEAL from the United States District Court for the District of Nevada (Las Vegas).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Las Vegas) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered NOVEMBER 9, 1982

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-1860

UNITED STATES OF AMERICA, APPELLANT-PLAINTIFF,

v.

STEPHEN ANTHONY GONSALVES, DEFENDANT-APPELLEE.

FILED FEB. 28, 1983

ORDER

Before: ELY and NORRIS, Circuit Judges, and PECKHAM*, District Judge

The Petition for Rehearing is DENIED.

*Honorable Robert F. Peckham, Chief Judge, Northern District of California, sitting by designation.

APPENDIX F

LAWRENCE J. SEMENZA
United States Attorney
RICHARD A. WRIGHT
Assistant United States Attorney
300 Las Vegas Boulevard South
Las Vegas, Nevada 89101
385-6336

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Cr. LV 76-39, RDF
Filed Mar. 25, 1976

ERNEST FRANZ COMBS, JR.,
RICHARD KENNETH BROWN,
ROBERT CARL FRY,
ROBERT DAVID WORK
KENT GILES SNYDER,
JAMES MORRIS,
KENNETH GRAHAM PLINSTON,
DENNIS HOWARD MARKS,
SALIM INARD HRAOUI,
KARL FERDINAND KRUG,
KLAUS WARNER,
AREND CHRISTOPHER TERHORST AND
STEPHEN ANTHONY GONSALVES,

VIOLATION:

21 U.S.C. § 963—Conspiracy to Import a Controlled Substance;
21 U.S.C. § 846—Conspiracy to Possess with intent to distribute a controlled substance

---

INDICTMENT

COUNT I

(Conspiracy to Import a Controlled Substance)

The Grand Jury charges: THAT

ERNEST FRANZ COMBS, JR.,
RICHARD KENNETH BROWN,
ROBERT CARL FRY,
ROBERT DAVID WORK,
KENT GILES SNYDER,
JAMES MORRIS,
KENNETH GRAHAM PLINSTON,
DENNIS HOWARD MARKS,
SALIM INARD HRAOUI,
KARL FERDINAND KRUG,
KLAUS WARNER,
AREND CHRISTOPHER TERHORST and
STEPHEN ANTHONY GONSALVES,

defendants herein, from on or about January 1, 1973, and continuously thereafter up to June 18, 1974, in the Southern, the Central, and the Eastern Districts of California, the District of Nevada, and elsewhere, and JAMES EARL GATER, JR., RAYMOND BARRY MAYO, RICHARD JONATHAN VICKERS, ALLEN RICHARD WHITE, GARY LYNN LICKERT, MARY JEAN GORMAN, BRENDA MARIE SIBSON, PATRICIA LESLIE GREEN, LISA ANN PHILBEE, JEFFREY MARK HAGEN, HAROLD ADRIAN ARMSTRONG, CHARLENE ROSE COLON, MARIAM GAY RABER, DAVID GLENN CUNNISON, BENNY BEHR, MICHAEL JOHN BELL and BILLY EUGENE GREENWOOD, named herein as co-conspirators, but not as defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, and with others unknown to the Grand Jury, to commit offenses against the United States, that is, to import into the United States from Afghanistan, Pakistan, Lebanon, France, Italy, Austria, the Netherlands, the United Kingdom, and other places outside the United States, marijuana (hashish), a Schedule I controlled substance in violation of Title 21, United States Code, Sections 952(a) and 960(a)(1).

It was part of said conspiracy that defendants ERNEST FRANZ COMBS, JR., JAMES MORRIS, and KENNETH GRAHAM PLINSTON, would purchase marijuana (hashish) from defendants SALIM INARD HRAOUI, KARL

FERDINAND KRUG, KLAUS WARNER, AREND CHRISTOPHER TERHORST, and other unknown to the Grand Jury, and that the purchase of said marijuana (hashish) would take place in Afghanistan, Pakistan, Lebanon, France, Italy, Austria, and the Netherlands, the United Kingdom and other places outside the United States.

It was further part of said conspiracy that defendants ERNEST FRANZ COMBS, JR., JAMES MORRIS, and KENNETH GRAHAM PLINSTON would arrange to have the marijuana (hashish) concealed in acoustical sound speaker cabinets and imported into the United States under the name Trans-Atlantic Sound Company.

It was further part of said conspiracy that defendant ERNEST FRANZ COMBS, JR., would recruit couriers and convey directions to the couriers.

It was further part of said conspiracy that defendants RICHARD KENNETH BROWN, ROBERT CARL FRY, ROBERT DAVID WORK, KENT GILES SNYDER, DENNIS HOWARD MARKS, and unindicted co-conspirators JAMES EARL GATER, RAYMOND BARY MAYO, RICHARD JONATHON VICKERS, ALLEN RICHARD WHITE, GARY LYNN LICKERT, MARY JEAN GORMAN, BRENDA MARIE SIBSON, PATRICIA LESLIE GREEN, LISA ANN PHILBEE, JEFFEREY MARK HAGEN, HAROLD ADRIAN ARMSTRONG, CHARLENE ROSE COLON, MARIAM GAY RABER, DAVID GLENN CUNNISON, BENNY BEHR, MICHAEL JOHN BELL, and BILLY EUGENE GREENWOOD, and others unknown to the Grand Jury, would act as assistants and/or couriers and would assist in the purchasing and/or importing of the concealed marijuana (hashish) into the United States from Afghnistan, Pakistan, Lebanon, France, Italy, Austria, the Netherlands, the United Kingdom, and other places outside the United States.

In furtherance of said conspiracy, and to effect the objects thereof, the defendants and unindicted co-conspirators committed the following overt acts, among others:

OVERT ACTS

1. On or about March 4, 1973, JAMES MORRIS shipped the ten acoustical sound speaker cabinets containing marijuana (hashish) by TWA from Orly Airport, Paris, France, to J.F.K. International Airport, New York.

2. On or about March 7, 1973, at Lake Tahoe, California ERNEST FRANZ COMBS, JR., requested James Earl Gater, Jr., to pick up acoustical sound speaker cabinets at the Los Angeles International Airport, Los Angeles, California.

3. On or about March 8, 1973, RICHARD KENNETH BROWN, ROBERT DAVID WORK and James Earl Gater, Jr., unloaded approximately 724 lbs. of marijuana (hashish) from the acoustical sound speaker cabinets.

4. On or about March 14, 1973, James Earl Gater, Jr. met with SALIM INARD HRAOUI at Graz, Austria, to sample marijuana (hashish).

5. On or about March 20, 1973, at Graz, Austria, KLAUS WARNER gave James Earl Gater, Jr. keys to a vehicle containing approximately 200 kilograms of marijuana (hashish).

6. On or about April 11, 1973, at Graz, Austria, ROBERT CARL FRY turned over to James Earl Gater, Jr. approximately $120,000.00 left over from the approximately $300,000.00 used to purchase the marijuana (hashish).

7. On or about May 6, 1973, James Earl Gater, Jr. transported KENT GILES SNYDER to the Vienna, Austria Airport were KENT GILES SNYDER departed for Geneva, Switzerland, carrying a briefcase containing the $120,000.00.

8. On or about May 25, 1973, STEPHEN ANTHONY GONSALVES delivered to Harold Adrian Armstrong, Long Beach, California, approximately $140,000.00 in cash.

9. On or about May 26, 1973, at 79 Marylands Road, London, England, Harold Adrian Armstrong gave KENNETH GRAHAM PLINSTON the briefcase containing the $140,000.00.

10. On or about June 1, 1973, at Newport Beach, California, ROBERT DAVID WORK and ERNEST FRANZ COMBS, JR. rented apartment 302 at 3110 Park

Newport, Newport Beach, California. All in violation of Title 21, United States Code, Section 963.

COUNT II

(Conspiracy to Possess with intent to distribute a controlled subtance)

The Grand Jury further charges: THAT

ERNEST FRANZ COMBS, JR.,
RICHARD KENNETH BROWN,
ROBERT CARL FRY,
ROBERT DAVID WORK,
KENT GILES SNYDER,
JAMES MORRIS,
KENNETH GRAHAM PLINSTON,
DENNIS HOWARD MARKS,
SALIM INARD HARAOUI,
KARL FERDINAND KRUG,
KLAUS WARNER,
AREND CHRISTOPHER TERHORST and
STEPHEN ANTHONY GONSALVES,

defendants herein, from on or about January 1, 1973, and continuously thereafter up to June 18, 1974, in the Southern, the Central, and the Eastern districts of California, the District of Nevada, and elsewhere, and JAMES EARL GATER, JR., RAYMOND BARRY MAYO, RICHARD JONATHAN VICKERS, ALLEN RICHARD WHITE, GARY LYNN LICKERT, MARY JEAN GORMAN, BRENDA MARIE SIBSON, PATRICIA LESLIE GREEN, LISA ANN PHILBEE, JEFFREY MARK HAGEN, HAROLD ADRIAN ARMSTRONG, CHARLENE ROSE COLON, MARIAM GAY RABER, DAVID GLENN CUNNISON, BENNY BEHR, MICHAEL JOHN BELL and BILLY EUGENE GREENWOOD, named herein as coconspirators, but not as defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, and with others unknown to the Grand Jury, to commit offenses against the United States, that is, to possess a Schedule I controlled substance, to wit, marijuana (hashish) with the intent to distribute and distri-

bution of marijuana, in violation of Title 21, United States Code, Section 841(a)(1).

It was part of said conspiracy that defendants ERNEST FRANZ COMBS, JR., JAMES MORRIS, and KENNETH GRAHAM PLINSTON, would purchase marijuana (hashish) from defendants SALIM INARD HRAOUI, KARL FERDINAND KRUG, KLAUS WARNER, AREND CHRISTOPHER TERHORST, and others unknown to the Grand Jury, and that the purchase of said marijuana (hashish) would take place in Afghanistan, Pakistan, Lebanon, France, Italy, Austria, the Netherlands, the United Kingdom, and other places outside the United States.

It was further part of said conspiracy that defendants ERNEST FRANZ COMBS, JR., JAMES MORRIS, and KENETH GRAHAM PLINSTON would arrange to have the marijuana (hashish) concealed in acoustical sound speaker cabinets and imported into the United States under the name Trans-Atlantic Sound Company.

It was further part of said conspiracy that defendant ERNEST FRANZ COMBS, JR., would recruit couriers and convey directions to the couriers.

It was further part of said conspiracy that defendants RICHARD KENNETH BROWN, ROBERT CARL FRY, ROBERT DAVID WORK, KENT GILES SNYDER, DENNIS HOWARD MARKS, and unindicted co-conspirators JAMES EARL GATER, RAYMOND BARRY MAYO, RICHARD JONATHON VICKERS, ALLEN RICHARD WHITE, GARY LYNN LICKERT, MARY JEAN GORMAN, BRENDA MARIE SIBSON, PATRICIA LESLIE GREEN, LISA ANN PHILBEE, JEFFREY MARK HAGEN, HAROLD ADRIAN ARMSTRONG, CHARLENE ROSE COLON, MIRIAM GAY RABER, DAVID GLENN CUNNISON, BENNY BEHR, MICHAEL JOHN BELL, and BILLY EUGENE GREENWOOD, and others unknown to the Grand Jury, would act as assistants and/or couriers and would assist in the purchasing and/or importing of the concealed marijuana (hashish) into the United States from Afghanistan, Pakistan, Lebanon, France, Italy, Austria, the Netherlands, the

United Kingdom, and other places outside the United States.

In furtherance of said conspiracy, and to effect the objects thereof, the defendants and unindicted co-conspirators committed the following overt acts, among others:

OVERT ACTS

1. On or about March 4, 1973, JAMES MORRIS shipped the ten acoustical sound speaker cabinets containing marijuana (hashish) by TWA from Orly Airport, Paris, France, to J.F.K. International Airport, New York.

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4. On or about March 14, 1973, James Earl Gater, Jr. met with SALIM INARD HRAOUI at Graz, Austria, to sample marijuana (hashish).

5. On or about March 20, 1973, at Graz, Austria, KLAUS WARNER gave James Earl Gater, Jr. keys to a vehicle containing approximately 200 kilograms of marijuana (hashish).

6. On or about April 11, 1973, at Graz, Austria, ROBERT CARL FRY turned over to James Earl Gater, Jr. approximately $120,000.00 left over from the approximately $300,000.00 used to purchase the marijuana (hashish).

7. On or about May 6, 1973, James Earl Gater, Jr. transported KENT GILES SNYDER to the Vienna, Austria Airport where KENT GILES SNYDER departed for Geneva, Switzerland, carrying a briefcase containing the $120,000.00.

8. On or about May 25, 1973, STEPHEN ANTHONY GONSALVES delivered to Harold Adrian Armstrong, Long Beach, California, approximately $140,000.00 in cash.

9. On or about May 26, 1973, at 79 Marylands Road, London, England, Harold Adrian Armstrong gave

KENNETH GRAHAM PLINSTON the briefcase containing the $140,000.00

10. On or about June 1, 1973, at Newport Beach, California, ROBERT DAVID WORK and ERNEST FRANZ COMBS, JR. rented apartment 302 at 3110 Park Newport, Newport Beach, California. All in violation of Title 21, United States Code, Section 846.

A TRUE BILL:

/s/ ADELENE BARTLETT
ADELENE BARTLETT
Foreman of the Grand Jury

/s/ LAWRENCE J. SEMENZA
LAWRENCE J. SEMENZA
United States Attorney

/s/ RICHARD A. WRIGHT
RICHARD A. WRIGHT
Assistant United States Attorney

I hereby attest and certify on March 30, 1976 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

JOHN A PORTER
Clerk, U.S. District Court
District of Nevada

By INA LAVERN
INA LAVERN
Deputy

Office - Supreme Court, U.S.
FILED
JUN 29 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1944

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

STEPHEN A. GONSALVES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD P. CRANE, JR.
THOMAS V. GIRARDI
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STEPHEN A. GONSALVES

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No. 82-1944

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

STEPHEN A. GONSALVES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent opposes the petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Petitioner's Appendix A) is reported at 691 F.2d 1310. the district court's order granting respondent's motion to dismiss (Petitioner's Appendix B) is unreported. The 1976 oral opinion of the district court granting motions for "acquittal" filed by three other defendants charged along with respondent in the indictment (Petitioner's Appendix C) is unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the district court has the inherent supervisory power to dismiss an indictment which alleges separate and distinct multiple conspiracies as one general conspiracy, the effect of which causes duplicity, lack of jurisdiction and venue, and prejudicial variance.

STATEMENT

The facts of the case are stated fully in the decision of the Court of Appeals, Ninth Circuit (Petitioner's Appendix A at 1a - 10a).

ARGUMENT

The present decision is in full accord with other decisions adopted in the courts of appeals. Review on certiorari is therefore not warranted

since no conflict among the circuits exists with regard to the question presented.

Whether the district court has the supervisory power to dismiss, upon pre-trial motion, an indictment which alleges multiple conspiracies as one general conspiracy, the effect of which causes duplicity, lack of jurisdiction and venue, and prejudicial variance is a question answered in the affirmative by the courts on numerous occasions. Under facts such as those presented (Petitioner's Appenxix A, at 1a - 10a), the Ninth Circuit has unequivocally upheld the district court's invocation of its supervisory powers to dismiss cases when there is a clear basis in fact and law for doing so, or more broadly, where the assertion of supervisory power is necessary to preserve the integrity of the judicial process and to avoid fundamental unfairness. United States v. Chanen (9th Cir. 1977) 549 F.2d 1306; United States v. Wilson

(9th Cir. 1980) 614 F.2d 1224.

The overwhelming weight of evidence before the district court supported the invocation of its inherent supervisory powers, and it was therefore proper to dismiss the indictment which impermissibly alleged separate and distinct multiple conspiracies as one general conspiracy. This was particularly true where the dismissal remedied defects of duplicity, lack of jurisdiction and venue, and prejudicial variance.

To support respondent's position that multiple conspiracies were alleged as one general conspiracy resort must be made to the indictment, the Government's massive trial memorandum, the Government's opening statement and the detailed statements of the three prosecution key witnesses, James Earl Garter, Gary Lynn Lickert and Harold Adrian Armstrong. The effect of the information in this combination of evidence is the revelation of at least seven separate and

distinct conspiracies. These separate and distinct conspiracies contain overlapping groups of players at different times in different places allegedly effectuating the importation of controlled substances in a finite number of unique unrelated transactions.

Each importation characterized consisted of its own independent character unrelated in any material manner or element to the prior or following importation, even to the extent that all of the featured players in each importation disbanded at the conclusion of each episode. Therefore based upon the evidence before the court the present case fell within the parameters of applicable appellate decisions wherein multiple conspiracies were found. (See e.g. Kotteakos v. United States (1946) 328 U.S. 750; United States v. Durades (9th Cir. 1979) 607 F.2d 818; United States v. Butler (10th Cir. 1974) 494 F.2d 1246, 1254-1257; United States v. Bertolotti (2nd Cir.

1975) 529 F.2d 149, 154-159; United States v. Varelli (7th Cir. 1969) 407 F.2d 735; United States v. Arteaga-Limones (5th Cir. 1976) 529 F.2d 1183, 1194).

The district court's ruling, based upon the evidence before it, was consistent with the instructions provided under Rules 12 and 18 of the Federal Rules of Criminal Procedure. Rule 18 provides, except as otherwise permitted by statute or the Federal Rules of Criminal Procedure, the prosecution of a case shall be had in the district in which the offense was committed. Clearly the record establishes this rule was not followed with regard to Respondent since the Government in fact concedes in Appellant's Opening Brief, at pages 24-25 thereof:

> "If there were multiple conspiracies, Nevada would not have venue because most occurred in California and elsewhere. Furthermore,

> the Government concedes that it has no direct evidence of defendant GONSALVES participating in activities in the District of Nevada which would subject him to the venue of the Federal Courts in Nevada."

Since the record clearly establishes that the only events which occurred in Nevada were totally unrelated to any activity by Respondent, the district court's ruling was a proper exercise of its inherent supervisory powers and was consistent with the principles established by Rule 18.

Asserting defects of duplicity, lack of jurisdiction and venue and prejudicial variance, Respondent properly raised these defects by pretrial motion under Rule 12. In fact, as is evident in the decisions of United States v. Price (2nd Cir. 1971) 447 F.2d 23, 27, 28; and United States v. Boney (1978) 572 F.2d 397, 400, had Respondent

not raised these defects by pre-trial motion, the risk of waiver would have plainly presented itself. As such, Respondent was given little choice but to raise the issues of commingling of multiple separate and distinct conspiracies, lack of jurisdiction and venue and prejudicial variance. Dismissal was therefore appropriate, absent a finding of one massive general conspiracy.

Finally, dismissal was appropriate based upon the United States Attorney's recalcitrance in changing the indictment to a size consistent with the district court's suggestions following the initial dismissal without prejudice. This position was emphasized by the opinion of the Court of Appeals (Petitioner's Exhibit A, at 20a) wherein the court stated:

> "Although the court's order is not entirely explicit, it is clear that the indictment was dismissed without prejudice. The order suggested that

> the indictment be broken down into smaller, more manageable indictments, thus leaving the prosecutor free to reindict Gonsalves, and the other alleged conspirators, in a manner less intrusive upon the administration of a fair criminal justice system in the courts."

The Court of Appeals further emphasized in its concluding remarks (Petitioner's Exhibit A, at 23a) that the exercise here by the district court of its inherent supervisory powers did not constitute an improper substitution of judicial discretion for prosecutorial discretion:

> "Such dismissals may easily constitute an example of improper substitution of judicial discretion for prosecutorial discretion. It remains the perogative and responsibility of the executive to determine whether

to prosecute at all. In conrast, the district judge in this case left the government free to reindict the defendant, either in the same district pursuant to a more manageable indictment, or in another district, should a new indictment reveal a lack of jurisdiction over this particular defendant." (Emphasis added)

Accordingly, the United States Attorney was given the opportunity to refocus this attempt to force as many defendants as possible to trial in the same proceeding on the unfounded claim of a single conspiracy. The failure to alter this cumbersome indictment left the district court with one choice - the proper exercise of its inherent supervisory powers to dismiss the indictment.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

RICHARD P. CRANE, JR.

THOMAS V. GIRARDI

GIRARDI, KEESE AND CRANE

Attorneys for Respondent
STEPHEN A. GONSALVES

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Office Supreme Court, U.S.
FILED
SEP 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1944

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

STEPHEN A. GONSALVES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1944

UNITED STATES OF AMERICA, PETITIONER

v.

STEPHEN A. GONSALVES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

In our petition, we explained that the decision of the court of appeals upholding the district court's invocation of "supervisory power" to dismiss an indictment on the ground that conducting a trial would impose an undue burden upon the district court effects an unprecedented judicial intrusion upon the prerogatives of the prosecutor (together with the grand jury) to determine the charges upon which persons believed guilty of crimes are to be prosecuted. We also argued that this application of a claimed supervisory power serves none of the recognized purposes for exercise of supervisory power and represents an abdication of the district court's statutory jurisdiction to try "all offenses against the laws of the United States." 18 U.S. 3231. Finally, we argued in our petition that even if supervisory power to dismiss indictments is available to the courts in extraordinary cases, there is no attribute of this

case, which involves the trial of a single defendant upon a two-count indictment, that justifies exercise of such authority.

Respondent has essayed no response whatsoever to our contentions. Instead, respondent attempts to place the court of appeals' decision upon a basis that is utterly foreign to the opinions below, suggesting (Br. in Opp. 4-9) that it rests upon findings that the indictment charged multiple separate conspiracies as a single offense and that venue for the offenses that he believes should have been charged would not lie in the District of Nevada. This characterization of the decision in this case lacks even colorable accuracy.

The court of appeals recognized (Pet. App. 8a-9a) that, in considering the motion for acquittal made on behalf of defendants Brown, Work and Snyder in 1976, the district court had discussed the questions whether the indictment charged multiple conspiracies as a single offense and whether, if that were so, venue was lacking. But the court of appeals concluded that the 1976 order of acquittal and the dismissal of the indictment as to respondent four years later rested squarely upon the district court's invocation of supervisory power to avoid what was regarded as an "unmanageable" trial. *Id.* at 9a & n.6, 10a, 18a.[1] And

---

[1]This assessment of the district court's ruling is clearly correct. See Pet. 5-9. The district court's ruling on respondent's motion to dismiss, invoking the oral ruling from 1976, removes any possibility of confusion on this point (Pet. App. 26a (citations omitted)):

> This Court is well aware that a conspiracy prosecution may be brought in any district in which any act in furtherance of the conspiracy was committed by any of the conspirators, even though some of them were never physically present there. * * * And, the actions in Las Vegas of Ernst Franz Combs, Jr., an indicted coconspirator, and Gary Lynn Lickert, an unindicted coconspirator, could be used to establish the necessary overt act

even the most casual reading of the court of appeals' opinion reveals that it rests entirely upon supervisory authority exercised on the basis of "institutional concerns" (*id.* at 14a); it does not seek to redress any infringement of respondent's rights or to correct any defect in the indictment or the venue laid. Indeed, the court of appeals never even mentioned any problem involving multiple conspiracies or venue in explaining why, in its view, the supervisory authority it recognized was properly exercised in this case. See Pet. App. 19a-20a. Instead, the court's conclusion was that the dismissed indictment "constituted a serious intrusion into the judiciary's interest in the fair administration of the criminal justice system." *Id.* at 19a.[2]

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within this district. However, the problem in *Brown* [the prosecution of Brown, Work, and Snyder] was that the indictment was such a complex monstrosity that this Court decided it should have been broken down into several smaller, more manageable indictments. There simply was no good reason for those defendants to be indicted in this district given their alleged roles in the Government's conspiracy theory. This Court is confronted with the same problem with the indictment against Gonsalves.

Therefore, for the same reasons articulated in this Court's September 21, 1976, order and judgment of acquittal as to defendants Brown, Work and Snyder, this Court hereby exercises its discretionary supervisory powers and dismisses the indictment as against defendant Gonsalves.

[2]We note, in any event, that none of the cases cited by respondent on the subject of multiple conspiracies (Br. in Opp. 6-7) suggests that the government may be deprived of the opportunity to establish to the satisfaction of a jury that respondent participated in the ongoing unitary conspiracy charged by the indictment. On the contrary, these cases all arise on post-conviction appeal by a defendant, and in each case the court's ability to determine the existence of multiple conspiracies depended upon the availability of the evidentiary record compiled at trial. For instance, the issue framed in *Kotteakos* v. *United States*, 328 U.S. 750, 756 (1946), was whether the "*variance in proof* from the single

There accordingly is no basis for diverting attention from the true ground of the decisions below: the novel assertion of judicial authority to determine, in light of considerations of judicial convenience and the court's views as to optimal prosecutorial practices, whether a prosecution on a charge properly returned by a grand jury should go forward. The court of appeals sought authority for the district court's dismissal of the indictment in Article III, asserting (Pet. App. 16a) that "Article III authorizes the judical branch to review the operations of the executive and legislative branches." But, as this Court noted in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 37 n.21, "[f]ederal courts do not enjoy a roving mandate to correct alleged excesses" of the Executive Branch; they "are limited by Art. III to hearing cases and controversies * * *."[3] The decision below thus runs roughshod over the constitutional independence of the prosecutor and grand jury.

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conspiracy charged in the indictment" was prejudical to the defendant (emphasis added). The other cases cited by respondent are similar.

The question whether a single conspiracy was established was thus —at least in the first instance — for the jury to determine based upon evidence to be adduced at trial. Although respondent repeatedly refers to the "evidence" before the district court (Br. in Opp. 5-6), the fact is that the government was not allowed to put in any evidence. Moreover, respondent's own recitation (*ibid.*) of the outlines of the criminal conduct the government offered to prove makes clear that here, as in many large drug conspiracy cases, the determination whether a unitary criminal enterprise was in operation rests largely upon the details of the evidence and the inferences to be drawn therefrom.

[3]We note that, in his dissent in *Chadha* (slip op. 37), Justice White singled out the process of "initiating prosecutions" as "an inherently executive function," interference with which by another branch of government would raise serious separation of powers issues.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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